JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 583

THE TEXAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 30, 1956.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 236 F. 2d 813. The dissenting opinion is reported at 236 F. 2d 793. The majority opinion in the companion case of *Magnolia Petroleum Co. et al* v. *Federal Power*

*Commission* is reported at 236 F. 2d 785. A petition for rehearing in the Court of Appeals was denied on August 21, 1956 and is reported at 236 F. 2d 815.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (App. 58), a petition for rehearing was filed with the Court of Appeals on July 26, 1956, (T. R. 185-189)[1] and denied by the Court of Appeals on August 21, 1956 (App. 58). The jurisdiction of this court is invoked under Section 19(b) of the Natural Gas Act; 15 U.S.C. 1254 (1); and 5 U.S.C. § 1009.

## QUESTIONS PRESENTED

1. Whether the Court below erred in (1) refusing to pass upon the constitutional and statutory validity of orders of the Federal Power Commission which the Commission had determined in independent proceedings to be applicable to petitioner and (2) striking from the record the Commission's determinations that petitioner was an "independent producer" within the purview of the orders?

2. Whether an order of the Federal Power Commission which compels petitioner to file retroactive rate schedules; to obtain certificates of convenience and necessity governing its sales and facilities without regard to the production or gathering exemption contained in Section 1(b) of the Natural Gas Act; to

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[1] By stipulation in the Court below the parties agreed that certain documents printed in a companion case, *Magnolia Petroleum Company* v. *Federal Power Commission*, No. 15320, were to be considered a part of petitioner's record. That record has been made a part of petitioner's record herein. Therefore, where petitioner refers to The Texas Company Transcript of Record the letters T.R. will be used and when petitioner refers to the Magnolia Transcript of Record the letters M.R. will be used.

obtain Commission approval before abandoning its sales or facilities without regard to the Section 1(b) exemption; to treat as rate changes firm provisions in its long term contracts calling for periodic adjustments in rates; and to be subject to severe civil and criminal sanctions and penalties for violation of any of the provisions of the order is so substantive in form and effect as to be judicially reviewable?

## STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Fifth Amendment to the Constitution of the United States; the Natural Gas Act (52 Stat. 821-833, 15 U.S.C. 717 *et seq.*); and Orders 174-A and 174-B of the Federal Power Commission are set forth in the appendix at pp. 59-69.

## STATEMENT OF THE CASE

Prior to the decision of the Supreme Court on June 7, 1954 in the case of *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U.S. 672, the Texas Company, petitioner herein, produced, gathered, processed and sold natural gas. Until that decision, none of its activities had been regarded as being within the regulatory jurisdiction of the Federal Power Commission (hereinafter sometimes referred to as the "Commission"). The *Phillips* case held that an independent producer, which sold its residue gas in interstate commerce for resale *after production and gathering had been completed,* was subject to the provisions of the Natural Gas Act (hereinafter sometimes called the "Act"). On July 16, 1954 the Commission issued Order 174 (M.R. 87-111; 19 F.R. 4534). On August 6, 1954 the Commission issued Order No. 174-A which superseded Order No. 174 (App. 70-88). Neither of

these orders was preceded by notice or hearing. They were entirely *ex parte.*

On August 25, 1954, petitioner filed with the Commission an application for rehearing and requested an opportunity to present evidence in respect to Order No. 174-A (T.R. 51-74). On September 8, 1954, the Commission issued an order granting oral argument but denied all other relief sought including petitioner's request to present evidence (M.R. 117-122). Thereafter, on September 22 and 23, 1954, petitioner and more than 100 other independent producers orally argued the invalidity of Order No. 174-A through a few selected representatives (M.R. 123-369).

By Order dated September 24, 1954, the Commission extended the filing dates established by Order No. 174-A so as to postpone until December 1, 1954 the date on which "independent producers" were required to file (1) "rate schedules" as defined in Order No. 174-A and (2) applications for certificates of public convenience and necessity as to all "rate schedules" in effect on June 7, 1954 (M.R. 370).

On December 17, 1954, the Commission issued Order No. 174-B which amended Order No. 174-A in certain minor respects that are unimportant here and also denied all petitions for rehearing of Order No. 174-A (App. 89-115).

On February 10, 1955, petitioner filed a petition for review of the legality of Order No. 174-A, as amended, in the United States Court of Appeals for the Fifth Circuit (T. R. 7-24). On June 30, 1956, the Court of Appeals for the Fifth Circuit dismissed the petition for review for lack of jurisdiction (App. 58). Judge Brown wrote an analytical and discerning dissent in

which he concluded Order No. 174-A, as amended, was a reviewable order (App. 21-57).[2]

On July 26, 1956, petitioner filed a petition for rehearing in the Court of Appeals for the Fifth Circuit (T.R. 185-189). This was denied on August 21, 1956, Judge Brown again dissenting (App. 58).

On September 27, 1956, the Commission further amended Order No. 174-B in a respect not now material (Order No. 190, 21 F.R. 7616, October 4, 1956).

## REASONS FOR GRANTING THE WRIT

The sole question presented by this petition is whether the Court below had jurisdiction to determine the constitutional and statutory validity of Order No. 174-A, as amended.[3] This question involves two parts. The first concerns the standard of reviewability of administrative orders. As to this there is no substantial disagreement between the parties, for the Commission, the Court below, and the petitioner all discuss and draw the same legal conclusions from the same cases. The second part of this question requires the application of the standard of reviewability to the Order and its consequences. It is on this part of the jurisdictional question that the parties disagree vehemently. The requirements of the order are easily ascertained from its provisions. The *effect* of the requirements is properly a factual determination for which there is no evidentiary basis other than petitioner's undenied allegations before the Commission

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[2] Petitioner believes this opinion is an excellent statement of the problems created by the Order.

[3] Unless the context requires otherwise petitioner will hereinafter refer to Order 174-A, as amended, as merely the "Order".

and the Court below. As that Court granted the Commission's motion to dismiss, petitioner's allegations must be admitted for the purposes of this petition.

Petitioner will show that the standard of reviewability to be applied here is established in *Rochester Telephone Corporation* v. *United States,* 307 U.S. 125 (1939); *Columbia Broadcasting System, Inc.* v. *United States, et al,* 316 U.S. 407 (1942); *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); and *United States* v. *Storer Broadcasting Company,* 351 U.S. 192 (1956). Petitioner will also show that judicial review of the Order is required by the doctrines of those cases.

## I.

### AN ORDER WHICH PROMULGATES REGULATIONS HAVING AN IMMEDIATE, SUBSTANTIVE IMPACT UPON PETITIONER'S CONTRACTS, RATES, AND BUSINESS OPERATIONS IS JUDICIALLY REVIEWABLE

The Court below dismissed petitioner's petition for review under Section 19(b) of the Natural Gas Act and Section 10 of the Administrative Procedure Act for lack of jurisdiction. We think it is clear that the Court below had jurisdiction. Numerous cases have held that an order resulting in the effect alleged herein is appealable. In *Columbia Broadcasting System, supra,* the Federal Communications Commission issued an order promulgating rules and regulations with reference to the licensing of broadcasting stations. Columbia, a network which was not even required to be licensed, sought judicial review of the order alleging that it was beyond the power of the Commission; that it would interfere with existing contracts and future negotiation of contracts; and that it would impair Columbia's ability to maintain and carry on its network. The lower Court dismissed Columbia's suit

for lack of jurisdiction. In finding the order reviewable the Supreme Court relied on the facts that (1) the regulations prescribed rules governing the contractual relationship between the stations and the networks, (2) failure to comply with the regulations resulted in penalties for the licensees; (3) the regulations adversely affected existing contracts; and (4) the regulations attached legal consequences in advance of other possible proceedings. Petitioner's case falls within any or all of these guiding principles.

The *Rochester Telephone Corporation* case, *supra,* is to the same effect. There, Section 2(b) of the Federal Communications Act provided that the Federal Communications Commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier" where the other carrier did not directly or indirectly control the connecting carrier (47 U.S.C. 152). The Communications Commission issued a ruling that Rochester was subject to the regulation. Rochester claimed it was outside the Act. A hearing resulted in the determination that Rochester was under the control of another connecting company and therefore subject to the Act. When the case reached the Supreme Court the government raised, for the first time, the jurisdiction of the Court to review the order. The Supreme Court held that the order was:

> "... not a mere abstract declaration regarding the status of the Rochester under the Communications Act, nor was it a stage of an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory

> orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission." (pages 143, 144).

The *Rochester* case provides a compelling analogy for review of the order in the case at bar. In the *Rochester* case a determination of status carried obedience to previously and independently formulated mandatory orders. The Court found the status determination reviewable. In the present case, petitioner's status had been adjudged and determined prior to the issuance of the Commission's final order of which review is sought. Both cases present the question of reviewability of determinations of status and mandatory orders in separate proceedings. In the *Rochester* case the regulatory orders were unchallenged, but petitioner's status was contested. In the present proceeding the Commission's determination of petitioner's status as an independent producer is unchallenged, but petitioner does most seriously contest the constitutional and statutory validity of the regulatory orders to which it is subjected.

In *Frozen Food Express, supra,* carriers subject to the Interstate Commerce Act were required to obtain certificates of convenience and necessity. An exemption from this requirement was granted those carrying certain "agricultural" commodities. The Interstate Commerce Commission, on its own motion, held a hearing which resulted in an order that certain commodities were not "agricultural" within the meaning of the exception. Thus persons engaged in transporting those commodities were required to have certificates of convenience and necessity. Frozen Food Express

which transported such commodities but had not been a party to the hearing, brought suit alleging the order was illegal and that the commodities it transported were exempt under the Act. The Supreme Court, in reversing a lower court finding that the order was not reviewable,[4] held the order was reviewable as it was the basis on which carriers arranged their business affairs and it had an immediate and practical impact on Frozen Food Express which was compelled to risk civil and criminal sanctions and penalties if it violated the order. Because the order had such effect, this Court held that Frozen Food Express was not obliged to apply for a certificate of convenience and necessity nor to await enforcement action before it could contest the order. As will be seen below, Order 174-A, as amended, has the identical affect on petitioner as the Interstate Commerce Commission Order had on Frozen Food Express.

In *Storer Broadcasting Company, supra,* the Federal Communications Commission issued a notice of proposed rule making to amend its rules relating to multiple ownership. The proposal provided that licenses "shall not be granted" if the applicant, directly or indirectly has an interest in five or more stations. Interested parties were permitted to file briefs. An order amending the rules in substantially the form proposed was entered. Storer owned or controlled more than five stations and brought suit asserting the invalidity of the order. The Supreme Court, *sua sponte,* raised the question of Storer's right to appeal and held the order reviewable even though Storer had not applied for and been denied a license. The rationale of the holding was that the order determined eligibility for licenses and operated to control the business affairs

[4] 128 F. Supp. 374 (Three Judge Court, S.D. Tex, 1955).

of Storer so that Storer could not cogently plan its present or future operations. The order in the case at bar has the same effects.

From these cases, it is submitted that an administrative order of general applicability is judicially reviewable if it changes existing status or impairs contractual rights and obligations or has an immediate and substantive impact on present and future business plans and operations or attaches legal consequences in advance of a hearing or exceeds the constitutional or statutory jurisdiction of the regulatory body.

This doctrine is particularly applicable where, as here, severe civil and criminal sanctions and penalties are imposed for violation of the regulations.[5]

## II.

## THE ORDER OPERATES TO CONTROL PETITIONER'S PAST, PRESENT AND FUTURE CONTRACTS AND BUSINESS OPERATIONS

Before discussing significant portions of the Order and its obvious effects, petitioner emphasizes that it is not here concerned with the validity of the Order but only with its reviewability.

Petitioner also wishes to stress that there were no facts upon which the Court below could have relied for its decision. The simple reason for this is that the Commission denied petitioner the right to adduce

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[5] Sections 20 and 21 of the Act. Mr. Justice Frankfurter's dissent in the *Columbia* case, *supra*, characterizes many other cases where administrative orders had been found reviewable and which involved penalties. In discussing one of such cases, *United States* v. *Berwind-White Coal Mining Co.*, 274 U.S. 564 (1927), he stated, "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." 316 U.S. at 434.

evidence.[6] This in turn demonstrates that the Court below disregarded petitioner's undenied allegations of the Order's substantive impact and the resulting irreparable injury to it. On accepted principles such allegations must be deemed admitted by the motion to dismiss.

The specific reasons petitioner believes Orders 174-A and 174-B are subject to judicial review are summarized as follows:

A. The Commission has determined that petitioner is subject to its jurisdiction in proceedings initiated under the Orders.

B. The Order establishes petitioner's rates retroactively.

C. The Order deprives petitioner of its right to fix initial rates.

D. The Order deprives petitioner of its contractual benefits by making every contractual provision relating to an increase in price a rate change subject to Section 4(e) of the Act.

E. The Order unlawfully dedicates petitioner's private property to public use by requiring petitioner to maintain its sales and facilities as of June 7, 1954.

F. The Order is beyond the statutory power of the Commission.

G. The Order is beyond the constitutional power of the Commission as it was promulgated without notice or hearing.

Inasmuch as petitioner has conceded and the Commission has found that petitioner is subject to the

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[6] Strangely, the majority in the Court below relied upon the lack of a hearing and evidence to base its conclusion that Order 174-A was not an "order" within the purview of Section 19(b) of the Act (App. 16-17).

Order it is inconceivable that such minute regulation of the 7th largest industry in the United States is not open to judicial review.

**A. The Commission Has Found that Petitioner Is Subject to Its Jurisdiction Under Orders 174-A and 174-B**

In the Court below the Commission moved to dismiss petitioner's petition for review on the ground that petitioner had not been found to be subject to the Orders. To combat this contention, petitioner obtained the certification of a supplemental record consisting of 13 contracts together with the Commission's determinations that 3 of those contracts involved sales within its jurisdiction which made petitioner an "independent producer" within the meaning of the Order (T.R. 82 and 94). The remaining 10 contracts had not at that time been acted on by the Commission.

The Commission's brief in the Court below raised objections to these documents being a part of the record. However, the General Counsel of the Commission, in oral argument before the Court below, conceded that these determinations and contracts should be before the Court in reaching its decision on the reviewability of the Commission's orders. Notwithstanding this concession, the majority of the Court below struck the contracts and orders determining petitioner's status from the record because they were entered in independent proceedings. Petitioner asserts that this was error.[7]

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[7] Despite this error this Court may judicially notice the Commission's determinations as they were all published in the Federal Register (44 U.S.C. 307(d)). In addition, petitioner has made the contracts and determinations a part of the record in this Court and has printed the determinations in the appendix hereto, pp. 116-144.

To focus this issue, the background of the filing of these contracts becomes important. After the issuance of Order 174-A petitioner had the choice of filing its contracts for the sale of natural gas or being in violation of the Order for which petitioner would have been subject to civil and criminal action. This was no choice at all so petitioner filed under protest some 130 of its contracts having to do with the sale of its natural gas. Among them were the 13 contracts which were stricken from the record by the Court below. These 13 involved the sale of surplus residue gas from the tail-gate of a processing plant and were similar in that respect to the contracts before this Court in the *Phillips* case. These contracts were filed with the Commission on or before December 1, 1954, and were a part of the record in this proceeding (T.R. 93-94). With respect to three of the contracts, namely, Nos. 1, 2 and 12 in the summary (T.R. 93), the Commission determined that petitioner is a "natural-gas company" within the meaning of the Act (App. 116-144). The Commission's determinations with respect to petitioner's contracts with United Fuel Gas Company, dated September 10, 1952, and May 22, 1953, were made on October 28, 1954, under Order 174-A (Id. at pp. 124-126; and pp. 137-140). The determination concerning the Texas Illinois Natural Gas Pipeline Company contract dated September 1, 1952, was made January 28, 1955, under Order 174-B (Id. at pp. 143-144). Thus, at a time before petitioner sought judicial review of Order 174-A, as amended, petitioner had already been determined to be subject to the Commission's jurisdiction under the challenged Orders.

Petitioner submits that the Court below erred in striking from the record the contracts and determinations which showed that petitioner was bound by the

Orders of which review is sought. As the status determination in *Rochester* was reviewable because it required obedience to previously formulated orders so should the courts review mandatory orders where there are previously formulated decisions on petitioner's status. Had the Court permitted the contracts and determinations to remain a part of the record they would have served to show:

1. That the Commission made a jurisdictional determination that petitioner is an "independent producer" subject to the requirements of Orders 174-A and 174-B.

2. That petitioner, in fact, was required to comply with the positive commands contained in Order 174-A.

Petitioner does not seek review of the Commission's determination that certain of its contracts involve jurisdictional sales subject to the Commission within the meaning of the decision of this Court in the *Phillips* case, *supra*. However, petitioner does now urgently contend, particularly in view of the fact that it has expressly been found to be subject to the Commission's jurisdiction, that the substantive and mandatory orders of the Commission must be subjected to judicial scrutiny so that their legality can be ascertained. The burden of petitioner's complaint is not that it has been erroneously subjected to Commission jurisdiction, but that the proper Commission jurisdiction has been unlawfully applied to deprive petitioner of its constitutional and contractual rights in the manner outlined in the following sections of this petition.

**B. The Order Illegally Established Petitioner's Rates Retroactively**

Section 154.92 (a) of Order 174-A, as amended, commanded petitioner, on or before December 1, 1954, to "file with the Commission rate schedules * * * setting forth the terms and conditions of service and all rates and charges for such * * * sale *effective on June 7, 1954*" (Emphasis added).

Any change in the rates so filed was prohibited by Section 154.94 of the Orders unless a change in rate schedule was first filed with and approved by the Commission. Thus petitioner's rates were frozen as of June 7, 1954, a date prior to the issuance of the Order. Only the Commission knows why this was done. Its reasoning was simple but obviously highly arbitrary and illegal. The retroactive rates were established:

> "For the Commission was aware that regulations made applicable prospectively are inevitably an invitation to affect change before such regulations become effective. * * * The June 7 date forestalled any such manipulation." (Commission's Brief in the Court below, page 56)[8]

Such reasoning, *based on no evidence,* is the most eloquent testimony favoring the need for judicial review of the Orders. Especially is this so when it is considered that Section 5(a) of the Act gives the Commission ample authority, at any time and on its own motion, to order a reduction in rates if it finds they are unjust or unreasonable. Even Congress permitted a *minimum* of sixty days from the effective date of

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[8] The order was issued on a 3-1 vote of the then Commissioners. Commissioner Digby dissented in part on the ground that the order was arbitrarily retroactive in this respect.

the Act before a non-exempt natural gas company was obliged to file its rate schedules (Section 4(c)).

Further, petitioner submits that if it had been afforded notice and opportunity to present evidence it could have shown that all of its rates are contained in long term contracts entered into at arm's length and that they are not susceptible of manipulation.

The Commission's authority over rates is found in Section 4(c) of the Act which provides that persons subject to the Act shall file with the Commission schedules showing all rates for the sale of natural gas subject to the jurisdiction of the Commission *"under such rules and regulations as the Commission may prescribe" and "within such time * * * and in such form as the Commission may designate * * *."* This italicized language makes it clear that the Act was not to be effective until it was implemented by administrative rules to guide the industry. The Orders complained of herein gave the Act force and effect insofar as "independent producers" are concerned. In establishing retroactive rates the Commission exceeded its statutory authority. It has been held that the Commission does not have the power to establish rates retroactively under either of the only two sections of the Act giving it authority over rates. In *Federal Power Commission et al* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944), this Court, in considering the Commission's authority under Section 5 of the Act said:

> "* * * its power to fix rates admittedly is limited to those to be thereafter observed and in force (Section 5(a))."

The same ruling was made with respect to a proposed new rate under Section 4 in *Hope Natural Gas Com-*

*pany* v. *Federal Power Commission,* 196 F. 2d 803 (4th Cir. 1952).

No doubt such action is substantive. The impact on petitioner is severe. The Order, in this regard, is not at all prospective; it is and was intended to be retroactive. It controls one of the most important phases of petitioner's business. Under such circumstances the Court below had jurisdiction to review the challenged Orders.

**C. The Order Deprives Petitioner of Its Right to Fix Initial Rates**

It is well established that it is the right and duty of a public utility to initiate reasonable rates after which the regulatory body can determine their reasonableness. In *United States* v. *Illinois Central Railroad Company,* 263 U.S. 515 (1924), the Court was considering the rate-making provisions of the Interstate Commerce Act which in this respect are similar to the Natural Gas Act. At page 522 the Court said:

> "A carrier is entitled to initiate rates, and, in this connection, to adopt such policy of rate making as to it seems wise. * * *."

The Natural Gas Act also gives natural gas companies the right to initiate rates. In *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956) the Court said, " * * * The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act."

In this regard Section 4(c) of the Act provides that "* * * every natural gas company shall file * * * schedules showing all rates and charges * * *." The Commission's sole function under this section is to prescribe

the time, form and manner of filing such schedules. Again the magic date of June 7, 1954 looms large. For Order 174-A, as amended, specified that the rates to be filed on December 1, 1954 be the rates that were in effect on June 7, 1954. This requirement, in effect, established petitioner's initial rate. There is no language in Section 4(c) of the Act which permits or authorizes such a retroactive requirement. In fact, the language "* * * within such time (not less than sixty days from the date this Act takes effect) * * *" conclusively evinces the congressional intent that the Commission should take prospective action only.

Thus the Order, *per se,* has the direct, immediate, and substantial effect of depriving petitioner of its right to set initial rates. The injury to petitioner from this arbitrary and unlawful order is immediate as petitioner is deprived of contractual benefits to which it would otherwise be entitled as will be seen in the argument next below.

**D. The Order Deprives Petitioner of the Benefit of Its Contracts**

The Commission has long required pipeline companies applying for certificates of convenience and necessity to produce contractual and engineering evidence that they had a long term supply of natural gas (usually 15 to 20 years) adequate to meet all of the present and prospective needs of the communities to be served. Petitioner has acceded to this requirement made by the Commission of the pipeline companies and entered into long term contracts with such companies. Long term contracts obviously entail sacrifice by petitioner of its right to make new contracts from time to time at prices which reflect current costs and the increasing demand for natural gas. This is ex-

tremely important in the dynamic and expanding economy of the United States. Pipeline companies are also desirous of obtaining long term contracts in order to even their burden over the anticipated prosperity of the national economy and to get the benefit of low rates while interest charges on their debt investment are at a maximum. For these reasons petitioner and the pipeline companies have entered into contracts containing various clauses providing for periodic increases in the price of the gas during the 15 to 20 years of the contract's duration. The increases called for by these clauses are certain and specific both as to the time they will take effect and as to the amount of the increase. Without such protective clauses petitioner would not have entered into the contracts in the first place. All the contracts were the result of arm's length bargaining at a time when the Commission, the purchasers, and petitioner were operating under the belief that none of petitioner's sales were subject to the jurisdiction of the Commission.

How do the Orders affect such contracts? In the first place, Section 154.94(c) provides that any contractual provision providing for future or periodic changes in rate after June 7, 1954 shall constitute a "change in rate schedule". The result of this provision is that petitioner's contractual benefits are subject to being suspended pending a determination of their legality. Even though the increase is subsequently determined to be just and reasonable, petitioner will, in most instances, lose completely the benefits of its contracts for a period of five months (Section 4(e) of the Act).

A further effect of Section 154.94(c) is that it requires the dissection of petitioner's inseparable con-

tract provisions. The price provisions of petitioner's long term contracts form one inseparable contract. They are within the test laid down by the Supreme Court in *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 298 (1942), where the Court said:

> "* * * Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' Williston on Contracts, Rev. Ed., 3863 and cases there cited."

The *order* treats the *beginning* contract prices as "initial rates" and provisions therein concerning periodic increases as "changes in rates." It is impossible to understand how one inseparable contract can be so divided without notice or hearing and be immune from judicial review.

A further effect of the dissection of its contracts is that petitioner must proceed under section 4(e) of the Act and seek Commission approval for "changes in rates." On the other hand, if petitioner's contracts were treated as a whole then Section 5 of the Act would be applicable. The distinction between Sections 4(e) and 5(a) is substantial. In the first instance the Commission may suspend the proposed rates for five months and those increases can be lost to petitioner absolutely for the period of suspension. Furthermore, the burden of proof in justifying the rate is thrust on the "independent producer." Under Section 5(a) the Commission may investigate rates in effect and if it determines that those rates are unreasonable it may prescribe rates to be charged thereafter. In that instance the burden

of proof is on the party, presumably a purchaser or the Commission, seeking to change the existing rate.

It seems clearly unlawful for the Commission, at one and the same time, to say that a whole and inseparable contract provides both "initial" rates and rate "changes". We submit that the Commission erred both in attempting to specify "initial rates" and in determining that part of an "initial" filing is a rate "change".

Petitioner submits that if the prices to which it is entitled under its contracts are to be altered by the Commission, such change can only be made on a determination after hearing pursuant to Section 5 and on the basis of substantial evidence that its rates are unreasonable. It should not be required to forfeit the rates which are part and parcel of its contracts for a period of five months because of suspension by administrative fiat. Cf. *United Gas Pipeline Company* v. *Mobile Gas Service Corp., supra,* and *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 142 F. 2d 943, 954 (10th Cir. 1944), Aff'd. 324 U.S. 581 (1945).

**E. The Order Unlawfully Required Petitioner to Dedicate Its Private Property to Public Use**

Prior to the Orders petitioner could lawfully operate its business unfettered by regulations. Subsequently, petitioner was for all intents, in respect of its natural gas sales in interstate commerce, a public utility deprived of its many valuable rights. This leads to another of petitioner's contentions that Order 174-A, as amended, is illegal.

Section 157.23 prohibits petitioner from engaging in its business "without approval of the Commission evidenced by a certificate of public convenience and necessity." The clock was also turned back by this

section, for it required petitioner to obtain certificates for its sales "*on or since June 7, 1954*". And Section 157.28 provides in substance that no independent producer shall abandon any portion of its facilities, or any service rendered by means of such facilities without approval of the Commission first had and obtained. The effect of these two provisions was to make petitioner a public utility retroactively. Petitioner was not afforded an opportunity to elect to discontinue its sales. It was compelled to be a public utility. In this way petitioner was deprived of valuable statutory and contractual rights to decide whether to dedicate its property to public use.[9] The Natural Gas Act does not require or authorize such a result. Section 7(c) gave natural gas companies the option of discontinuing their sales *or* of continuing their sales and obtaining a certificate of public convenience and necessity. In addition to the statutory restriction it is a clearly established principle of law that neither the Courts nor regulatory commissions have power to compel the dedication of private property to public use. *Munn* v. *Illinois*, 94 U.S. 113, 126 (1877) and *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923).

Another consideration is that the Order abrogates petitioner's contracts retroactively. At a hearing petitioner would have shown that it refused to permit the majority of its contracts to contain a clause dedicating the reserves from which the sales were made to public use. In fact, its contracts contained provisions rendering them voidable if sales under them were found subject to federal regulations. The Order rendered

[9] Petitioner is not contending there is no jurisdiction in the Commission to carry out the Natural Gas Act. Petitioner is contending that the Commission's lawful jurisdiction has been unlawfully exercised.

these negotiated rights void and compelled petitioner to devote its property to public use.

The unlawfulness of these sections is also demonstrated by the way the Commission assumes, without statutory warrant, jurisdiction over petitioner's *facilities*. Section 157.28 in pertinent part prohibits petitioner from abandoning:

> "* * * all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, * * * *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas." (Emphasis supplied)

When consideration is given to the Order's definition of "independent producer"[10] it is readily seen that that portion of the order dealing with abandonment is beyond the scope of the Commission's authority as it obviously controls the facilities of production and gathering which are exempt under Section 1(b) of the Act. The *Phillips* case, *supra,* page 678 restated this Court's earlier observation in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company,* 337 U.S. 498, 505 that the "natural and clear meaning" of the phrase "production or gathering of natural gas" is that it encompasses "the producing properties and gathering facilities of a natural gas company." In *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581, 602-603 (1945) this Court stated

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[10] See pages 25-26, *infra.*

the production or gathering exemption, "* * * precludes the Commission from any control over the activity of producing or gathering natural gas." See also: *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682 (1947). As the Order prohibits abandonment of production and gathering facilities it is unlawful.

That the Commission anticipated this consequence is seen from the concluding sentence of Section 157.28 which provides that petitioner should comply with state conservation orders relating to the production or gathering of gas in the event of a conflict between a state order and Section 157.28. A collision with state conservation orders could not have occurred if the Commission had stayed within its orbit. The Commission's intent is evidenced by its statement in the Court below that:

> "* * * When the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, *including such sales in the area of production and gathering,* the Commission fully realized that there was a huge backlog of jurisdictional sales within its regulatory sphere * * *. (Emphasis added)[11]

The erroneous belief that it could regulate sales in the area of production and gathering also led the Commission into unlawfully regulating facilities in the same area. Thus the Commission misconstrued the Act and pertinent Supreme Court decisions and its resulting order is unlawful and beyond the Commission's statutory authority.

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[11] Commission Brief in *Magnolia Petroleum Co.* v. *Federal Power Commission,* No. 15320, page 3.

These sections are neither procedural nor prospective. They are substantive to the extent that petitioner was prohibited from carrying on its lawful business without Commission approval. They are therefore subject to judicial review.

**F. The Definition of "Independent Producer" in the Orders Is Illegal**

All the provisions of Order 174-A, as amended, many of which are discussed above, are made applicable to independent producers as that term is defined in the Orders. Section 154.91 provides:

> "(a) An 'independent producer' as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

Historically, independent producers had been considered exempt from the Act due to the provision of Section 1(b) which specifically excludes from Commission jurisdiction any power over "the production or gathering" of natural gas. To a limited extent the *Phillips* case held certain sales of independent producers subject to the Act. That case involved an independent producer which sold residue gas in interstate commerce for resale *at the tail-gate of its processing plant*. The Court held such sales were subject to the Act because production and gathering ended before the sales occurred. The Order completely disregards the limitations of the *Phillips* decision and the Act. It applies to all sales of natural gas, regardless of whether they are made before, during or after pro-

duction or gathering. In short, every producer whose natural gas is ultimately sold in interstate commerce for resale must comply with all the provisions of the Act and the Order. By definition the Commission has accomplished that which Congress said should not be done. The Order sprawls far beyond permitted boundaries, no doubt because of the erroneous belief that the *Phillips* decision required it to regulate all sales of natural gas in interstate commerce including *such sales in the area of production and gathering* (*supra,* page 24). This erroneous interpretation of *Phillips* has led the Commission into error which, because of its substantive impact on petitioner, should be judicially reviewed.

Although the thirteen contracts referred to above are jurisdictional, the majority of petitioner's sales are not *Phillips* type sales. They occur at points other than the tail-gate of a processing plant as in *Phillips.*[12] In a typical case petitioner will sell gas to a purchaser at the well head. The purchaser then transports the gas to a processing plant and, after processing, sells the residue gas to an interstate pipeline. The Order, by its terms and intent, covers such sales as well as the facilities used in rendering that service. This unwarranted extension of the Commission's jurisdiction has resulted in serious injury to petitioner. The mischief is achieved by the definition of independent producers. Further administrative proceedings would only compound the injuries to petitioner. Petitioner is an aggrieved party and the order is subject to judicial review.

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[12] A full description of all the various types of sales made by petitioner is contained in its petition for review in the Court below (T.R. 14-16) and in its petition for rehearing before the Federal Power Commission (T.R. 27-29).

**G. The Order Is Unconstitutional as It Is a Substantive Order Issued Without Notice or Hearing in Violation of the Fifth Amendment**

In the preceding sections of this brief petitioner has demonstrated that the Order is not "procedural" or "prospective" but is actually an adjudicatory order with immediate and positive consequences upon petitioner's business and contracts. It was originally issued without notice or hearing. It was only with respect to Order 174-B that petitioner was afforded an opportunity to argue orally, though at all stages petitioner was denied the right to adduce evidence. The result of this most obvious lack of procedural due process was a substantive order reaching into and controlling the innermost affairs of every independent producer in the United States. The result, as petitioner urged on the Commission, is chaos in the whole industry. One example alleged by petitioner should be sufficient to demonstrate the chaos. As of the present time, neither petitioner nor the companies with which it has contracted knows nor can know the status of hundreds of contracts. Until the order has been examined judicially all parties must proceed on the assumption that their contracts, where in conflict with the regulations, are void. This results in wholesale breaches of contract and unhealthy uncertainty throughout the industry.[13]

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[13] It borders on the frivolous to suggest that each of thousands of contracts must undergo extensive administrative action and court review before their validity can be determined. Such piecemeal review has been roundly condemned by all interested in the orderly administration of justice. Thus, it is now more than two years since the *Phillips* decision and its rates have not even been determined administratively (21 F.R. 8304, October 30, 1956). Surely a more chaotic condition cannot be imagined.

Administrative actions can only be upheld in the Courts if the action has been arrived at in accordance with constitutional safeguards. *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U.S. 292 (1937); *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U.S. 287, 304 (1933); and *Morgan* v. *United States,* 298 U.S. 468 (1936). Here the Commission has established retroactive rates, compelled petitioner to dedicate its private property to public use and impaired the obligations of petitioner's contracts without affording petitioner the rudimentary elements of fair play.

## CONCLUSION

We urge that this petition for a writ of certiorari should be granted for the reasons hereinabove set forth.

Respectfully submitted,

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NOV 16 1956

JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 583

THE TEXAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

## APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 15470

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THE TEXAS COMPANY, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

---

Petition for Review of an Order of the Federal Power Commission, sitting at Washington, D. C.

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(June 30, 1956.)

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Before BORAH, RIVES, and BROWN, Circuit Judges.

BORAH, Circuit Judge: This is a companion case to the four cases we have decided today in Numbers 15,320—*Magnolia Petroleum Company* v. *Federal Power Commission,* 15,321—*The Ohio Oil Company* v. *Federal Power Commission,* 15,352—*The Superior Oil Company* v. *Federal Power Commission,* and 15,354—*Wesley West* v. *Federal Power Commission.* Here as in the *Magnolia* case petitioner invokes the jurisdiction of this Court under Section 19(b) of the Natural Gas Act and Section 10 of the Administrative Procedure Act and seeks a review of Federal Power Commission Orders 174-A and 174-B. The basic contentions and the grounds asserted for vacating, setting aside, and nullifying these orders are in essence

identical to those urged by petitioners in the four companion cases, *supra*.[1] However, in addition, this case raises a further question not presented in the *Magnolia* case, and a review of the pertinent facts is necessary to properly dispose of that issue.

The petitioner here was among the numerous producers who filed with the Commission an application for rehearing of Order 174-A and, like the other applicants for rehearing, it was granted oral argument before the full Commission and was afforded an opportunity to submit briefs in support of its application. Following the submission of briefs and oral argument, as in the other cases, the Commission by order issued September 24, 1954, amended Order 174-A in a respect immaterial to the petitioner here, and extended the time for compliance with the order from October 1 to December 1, 1954, but it took no further action at that time upon the applications for rehearing. Thereafter, on December 17, 1954, the Commission issued Order 174-B in which it amended and restated Order 174-A and in addition denied all applications for rehearing respecting Order 174-A, including the one filed by petitioner herein.

In the meantime, and between September 29 and December 1, 1954, petitioner had filed with the Commission under protest numerous rate schedules among which were thirteen contracts which involved the sale of "surplus" residue gas from the tail-gate of a processing plant. Simultaneously and with each filing petitioner had also applied to the Commission for certificates of public convenience and necessity as to said contracts. With respect to three of the thirteen contracts, the Commission on October 28, 1954, and January 26, 1955, issued certificates of public convenience and necessity covering three sales of natural gas made by petitioner and

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[1] See footnote 7, *Magnolia Petroleum Company* v. *Federal Power Commission*, No. 15,320.

determined that petitioner is a natural-gas company within the meaning of the Act and that the sales by petitioner, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

Subsequent to the filing of this petition for review it was stipulated that the record in *Magnolia Petroleum Company* v. *Federal Power Commission, supra,* should be considered as a part of the record in the instant case, and by supplemental certification, the Commission also filed petitioner's application for rehearing of Order 174-A. Thereafter, petitioner by motion for certification of additional record sought to include in the record of this proceeding the aforementioned thirteen applications for and the orders of October 28, 1954, and January 26, 1955, granting certificates of public convenience and necessity. In its answer addressed to this motion the Commission urged that such additional applications and orders were not in any way related to the orders sought to be reviewed in this proceeding and that the documents covered by the stipulation and supplemental certificate which it certified to the Court constituted the entire record of the proceedings before the Commission in which it issued Orders 174-A and 174-B. The order sought by petitioner was granted by the Court, without prejudice to the Commission to urge or renew its objection to said documents upon the hearing and argument of the case on the merits, and the Commission has here vigorously renewed its objections and insists that the order requiring the filing of these additional documents was improvidently granted.

We think it plain that the documents which petitioner would have us consider do not constitute any part of the transcript of the record upon which the orders complained of were entered as provided by Section 19(b) of the Natural Gas Act. Instead, they constitute a part of the

record of entirely different and separate proceedings before the Commission, which proceedings petitioner concededly does not seek to review in the instant case. Yet, and despite the fact that petitioner does not challenge here the lawfulness of the October 28, 1954, and January 26, 1955, orders it nevertheless claims that because it has in other proceedings been held to be subject to Orders 174-A and 174-B, that this gives petitioner a right to seek a determination as to whether the orders themselves are valid, and by reason thereof the additional record containing the status adjudications is properly before this Court. In support of its contention petitioner argues that "the present case is so nearly on all fours with *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 83 L. Ed. 1147 (1939), that it should control this Court's decision in the present proceeding." We think that the *Rochester* case is inapposite for the all-sufficient reason that the order there challenged was a determination of status, whereas in the case at bar no such issue is presented. Here, as we stated at length in *Magnolia Petroleum Company* v. *Federal Power Commission, supra*, the orders sought to be reviewed did not determine the status of petitioner or any other independent producer, and in our view whether or not petitioner's status has been adjudicated in other proceedings is immaterial to the issue of reviewability of Orders 174-A and 174-B. Those orders promulgating rules and regulations of general applicability, which are nonreviewable under Section 19(b) because they of themselves neither determine status nor compel compliance with other mandatory orders of the Commission, are not transformed into reviewable orders simply because by separate orders the Commission has adjudicated petitioner's status. This being so, we are of the clear opinion that the record which the Commission certified to the Court by the stipulation and supplemental certificate constituted the entire record of the proceedings here at issue, and that we should strike from the record the

documents contained in the additional record which was certified to the Court in obedience to an order that was improvidently entered, and it is so ordered.

In the light of what we have just said, and by reason of the fact that the remaining issues in this case present an identity of legal principles with those involved in the *Magnolia* case, *supra*, we hold that the petition for review herein must be dismissed for lack of jurisdiction.

DISMISSED.

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BROWN, Circuit Judge, dissenting.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 15320

MAGNOLIA PETROLEUM COMPANY, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

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No. 15321

THE OHIO OIL COMPANY, *Petitioner*
versus
FEDERAL POWER COMMISSION, *Respondent.*

---

No. 15352

THE SUPERIOR OIL COMPANY, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

---

No. 15354

WESLEY WEST, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

---

Petitions for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

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(June 30, 1956.)

---

Before BORAH, RIVES, and BROWN, Circuit Judges.

BORAH, Circuit Judge: These are separate but companion cases and since they involve substantially similar facts and the same issues of law and come to us on one record they may conveniently be disposed of in one opinion. All of the petitioners herein have invoked the jurisdiction of this Court, under Section 19(b) of the Natural Gas Act, 15 U.S.C.A. 717r(b), to review certain orders of the Federal Power Commission which petitioners seek to have set aside, vacated and nullified. And all, save Ohio Oil Company, also claim that this Court is empowered under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 1009, to review the action of the Commission in issuing said orders.

It is believed that a history of the occurrences which give rise to these petitions for review will be helpful to an understanding of the questions involved. On June 7, 1954, the Supreme Court rendered its decision in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, holding that Phillips, a natural-gas producer and gatherer, was a "natural-gas company" within the meaning of that term as defined in the Natural Gas Act, and that certain of its admitted sales in interstate commerce of natural gas for resale were subject to the jurisdiction of and regulation by the Federal Power Commission.[1] This decision was contrary to the Federal Power Commission's prior interpretation of its jurisdiction over such activities,[2] and its im-

[1] Section 1(b) of the Natural Gas Act, 15 U.S.C.A. 717(b), provides: "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

[2] See 18 C.F.R. 2.54(b) which, prior to its being rescinded by Order No. 154, July 20, 1950, provided: "For the purpose of administering the Natural Gas Act, the Commission will construe the exemption contained in Section 1(b) [15 U.S.C.A.

mediate impact was to charge the Commission with the regulation of a great number of hitherto unregulated jurisdictional sales. Thus confronted with numerous practical considerations in adjusting its activities to the Court's interpretation of its regulatory sphere, the Commission on July 16, 1954, without prior notice of hearing, issued its order 174 amending and supplementing its long-existent rules and regulations under the Natural Gas Act, 18 C.F.R., Chapter 1, Subchapters A and E through G. These original rules were directed principally to interstate pipeline companies, but since by their terms they speak only of "natural-gas companies,"[3] the Commission concluded that save for the issuance of Order 174, they would have been applicable also to jurisdictional sales in the production and gathering portion of the natural-gas business.[4]

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717(b)], to the effect that the provisions of the act shall not apply to the 'production or gathering' of natural gas, as including arm's length sales of natural gas, by independent producers and gatherers, made during the course or upon completion of production and gathering. . . ."

[3] A "natural-gas company" is defined in Section 2(6) of the Natural Gas Act as ". . . a person engaged in the transportation of natural gas in interstate commerce, *or the sale in interstate commerce of such gas for resale.*" 15 U.S.C.A. 717a (6). (Italics ours.)

[4] The prefatory statement in Order No. 174 reads in part as follows:

"The rules and regulations heretofore adopted by the Commission pursuant to Sections 4 and 7 of the Act have been directed *principally* to interstate pipeline companies. *Those producers* and gatherers which come within the class found by the *United States Supreme Court in the Phillips case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act,* to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a *reasonable cut-off date should be fixed in order to avoid confusion in attempting to readjust past transactions. Therefore, we have determined*

The Commission's long-established rules, as well as Order 174, were issued under the rule-making authority vested in the Commission by Section 16 and were designed to implement Sections 4, 7, and 8 of the Act.[5] Order 174 pre-

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*to Provide* in the first instance, and subject to our further order, *reasonably simply rules and regulations applicable to these companies.* For these and other reasons, good cause exists for making the rules and regulations herein adopted effective on less than 30 days' notice and for making such rules and regulations applicable to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court decision in the Phillips Petroleum Company case.

*"Although the decision of the Supreme Court is, of itself, notice to all 'independent producers', as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.*

*"Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth."* (Italics ours.) 19 Federal Register 4535.

[5] Section 4(c) of the Natural Gas Act requires every natural-gas company to file with the Commission schedules of its rates and charges in such form as the Commission may designate and prescribe in its regulations. Section 4(d) prohibits, with certain exceptions, changes in rates except after 30 days' notice to the Commission and the public. Section 7(b) forbids the abandonment of facilities or service without the permission and approval of the Commission first being obtained. Section 7(c) prohibits engagement in operations subject to the Commission's jurisdiction unless a certificate of public convenience and necessity has been obtained from the Commission. Section 7(d) requires that applications for certificates be filed in such form, and notice thereof given, as the Commission may require. Section 8(a) authorizes the Commission to prescribe a system of accounts and classification of companies, and requires every natural-gas company to conform its accounts thereto.

scribed rules and regulations applicable only to "independent producers," that is, natural-gas companies in the producing and gathering area of the business, and they were therein defined as "any person . . . who is engaged in the production and gathering of natural gas and who transports . . . or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline." Among other things these rules and regulations prescribed the procedure to be followed by all independent producers, who, on or since June 7, 1954, had engaged in the interstate transportation or sale of natural gas subject to the Act, by providing that they were to: (1) file on or before October 1, 1954, their rate schedules in force on June 7, 1954, and the contracts effective as of June 7 were permitted to be filed as such "rate schedules"; (2) make no changes in the June 7, 1954, rates except after thirty days' notice to the Commission and subject to its right to suspend such changes; (3) apply to the Commission for certificates of public convenience and necessity covering the sale of such gas as is subject to the jurisdiction of the Commission; and (4) continue any sales or services rendered until termination was given the express approval of the Federal Power Commission in accordance with Section 7(b) of the Act. The Commission contends that the rules and regulations provided by Order 174 were formulated with these fixed objectives in view: (a) to relieve independent producers of accounting requirements and the maintenance of accounts under the Commission's Uniform System of Accounts; (b) to provide for simplified filing of gas sales contracts instead of converting such contracts into tariff form before filing and for simplified rate change procedures; and (c) to provide for simplified requirements and limited data in support of applications for certificates of public convenience and necessity.

Thereafter and upon further consideration, the Commission on its own motion amended and modified Order

174 by the superseding Order 174-A which was issued on August 6, 1954. Following the action of the Commission, petitioners in company with more than one hundred other persons and corporations applied for a rehearing and stay of Order 174-A. In their applications the validity of the order was challenged on numerous grounds, and, with the exception of Ohio Oil Company, each of the petitioners in its application for rehearing sought to have the Commission make a separate jurisdictional finding that it was not a "natural-gas Company" within the meaning of that term as defined in the Natural Gas Act. By an order issued on September 8, 1954, the Commission afforded all applicants who had questioned the lawfulness of Order 174-A an opportunity to submit briefs and oral argument on the applications for rehearing, but denied all requests for stay, assigning as reasons therefor the following:

> "In the absence of the rules provided by Order No. 174-A, the more stringent rules generally in effect and applicable to all natural-gas companies would be applicable to producers and gatherers who are also natural-gas companies under the Natural Gas Act (18 CFR, Chap. I, Parts 154 and 157). Accordingly, request for stay of Order No. 174-A is without reasonable justification and must be denied." 19 Federal Register 5952.

After the filing of briefs and after oral arguments were had, the Commission, on September 24, 1954, amended Order 174-A in a respect immaterial to the petitions here, and extended the time for compliance with the regulations prescribed therein from October 1 to December 1, 1954, but took no futher action at that time on the applications for rehearing. Following this action by the Commission, each of the petitioners herein filed in this Court a petition for review requesting a stay of Order 174-A pending final hearing on their petitions for review. Stays were granted to Magnolia Petroleum Company and to Ohio Oil Com-

pany, but not to either Superior Oil Company or Wesley West.

On December 17, 1954, which was subsequent to the time when true and correct copies of the documents reflecting all of the action taken by the Commission in issuing Orders 174 and 174-A had been certified and filed in this Court, the Commission further amended Order 174-A and expressly denied all applications for rehearing thereof. The revised sections were published together with the unchanged portions of that order and the order as so revised was designated as Order 174-B.[6] Thereupon Magnolia filed a supplemental petition for review in which it directed against Order 174-B all objections which it had previously made against Order 174-A. Superior by way of a responsive pleading likewise requested that its original petition be considered as directed against and as equally applicable to both orders. In the meantime the Commission had filed motions to dismiss against Magnolia and Ohio and had moved to vacate the stay orders which had been granted to those petitioners, but no motions to dismiss were filed as to Superior and Wesley West.

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[6] In this order the Commission also made it clear that the purpose of the order was not to determine status when it stated:

"* * * A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the Act by the decision of the United States Supreme Court in Phillips Petroleum Company v. Wisconsin, et al., 347 U.S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions."

At the outset it should be noted that the Commission urged no objection to this Court's considering the two supplemental requests for review of Order 174-B. While we are of opinion that the ultimate result in these cases will not be affected in the slightest degree by our consideration of Order 174-B, we are nevertheless and by virtue of Section 19 of the Natural Gas Act expressly precluded from considering petitioner's objections thereto for the reason that they have not been previously presented to the Commission in a petition for rehearing. *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 498. Accordingly, we shall confine our discussion to Order 174-A.

In their petitions for review of Order 174-A, petitioners assert that the order is reviewable, and although they deny that they are "natural-gas companies," petitioners nevertheless insist that they are "independent producers" within the definition of the order and as such they have standing to petition for review. As grounds for vacating, setting aside and nullifying the order, they set forth numerous specifications of error [7] in which they contend that its for-

[7] The divers specification of error, most of which are common to all petitioners though not identically phrased or bottomed upon the selfsame reasons, are substantially as follows:

1. Order 174-A was issued without hearing and without any findings by the Commission of facts based on evidence in support thereof, all in violation of and contrary to the Administrative Procedure Act and Natural Gas Act.

2. The order was issued without notice thereof and without valid or reasonable grounds being given for the waiver of notice, all as required by the Administrative Procedure Act.

3. The order does not allow petitioner sufficient time to comply without causing an undue hardship; and it deprives petitioner of the right to examine the officers of its purchasers regarding the volume of gas purchased which will be transported in interstate commerce.

4. The order, in effect, attempts to regulate the production and gathering of gas by petitioner and others, although

mulation and substance violate in certain particulars their rights under the Fifth and Tenth Amendments to the Constitution of the United States, and were contrary to the provisions of the Natural Gas Act and the Administrative Procedure Act. In addition they uniformly contend that

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under the Natural Gas Act such operations are specifically excluded from the jurisdiction of the Commission.

5. The order, if enforced, would deny the right to petitioner to determine by its own judgment whether it will or will not further operate in the production and sale of natural gas and the delivery thereof to pipe lines, for transmission in interstate commerce, and whether it will or will not be subject to regulation by the Commission and submit any of its business affairs and operations to the Commission's control.

6. The order, attempting to fix prices under petitioners' contracts as of June 7, 1954, and prohibiting any increase thereof, is arbitrary and unreasonable and in violation of the Commission's statutory authority for the fixing of rates or the setting aside of existing rates; and the order, insofar as it purports to so fix rates and insofar as it attempts to prohibit the increase of prices for gas sold by petitioner under its contracts, is in further violation of the statutory authority of the Commission.

7. The order, if enforced, would result in taking petitioner's property without due process of law; and said order would further operate as an arbitrary and unreasonable restraint on and denial of petitioner's liberty of contract, all in violation of the Fifth Amendment to the Constitution of the United States.

8. The Commission has heretofore in various dockets approved the contracts which petitioner has entered into with purchasing companies who may move such gas in interstate commerce. In granting certificates of public convenience and necessity to the purchasing companies the Commission cannot change the rate charge or classification provided in such contracts without first granting petitioner a hearing with respect thereto as is provided in the Natural Gas Act.

9. The order, insofar as it attempts or purports to require petitioner to apply for certificates of public convenience and necessity, to continue with its operations and the sale of natural gas for transmission in interstate commerce, and, insofar as it purports to forbid petitioner discontinuing any service being rendered on the date thereof for the sale of natural

although Order 174-A purports to be procedural in form, it is actually final and adjudicatory in that it requires and inhibits certain actions, violates their substantive rights and causes them rreparable injury, all of which, under the authority of *Columbia Broadcasting System v. United States,* 316 U.S. 407, make the order subject to review in this Section 19(b) proceeding. In the alternative, they contend that if the order does consist only of procedural rules and regulations, it is nonetheless void for the reason that before the order was adopted petitioners were not accorded the notice and hearing to which they were entitled under the Natural Gas Act and the Administrative Procedure Act.

The Commission on the other hand vigorously insists that this Court has no jurisdiction to entertain the petitions for review (1) because petitioners have not exhausted the administrative remedies which are available to them; (2) because petitioners are not "aggrieved" by the order; and, (3) because Section 19(b) of the Natural Gas Act does not provide for review in this Court of orders which merely promulgate procedural rules of general applicability.

We agree with the Commission that Order 174-A is not judicially reviewable under Section 19(b) for the reason that it is not an "order" which satisfies the distinctive and controlling conditions to bring it within the purview

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gas, is further in violation of the Fifth Amendment to the Constitution of the United States in that it would take petitioner's property without due process of law and would also take petitioner's private property for public use without just compensation.

10. The order, insofar as it purports to prohibit the discontinuance of production by petitioner of any gas or the deliveries thereof, or from decreasing the amount of gas being delivered, or insofar as it requires production and delivery of gas in any quantities, is contrary to and invades the rights reserved to the States for the regulation and conservation of natural resources by State authority; and the order, therefore, is in violation of the Tenth Amendment to the Constitution of the United States.

of the statute. By Section 19(b) Congress formulated the exclusive conditions under which resort to this Court may be had when it provided that: "any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals . . ." This language of the statute does not authorize a review of *every* order that the Commission may make and the context of Section 19(b) makes clear the nature of the orders which are reviewable in this Court by requiring that, upon service of the petition for review, the Commission is to certify and file with the Court of Appeals, "a transcript of the record upon which the order complained of was entered." The review provisions of Section 19(b) thus relate solely "to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 385,[8] *United Gas Pipeline Co. v. Federal Power Commission, D.C. Cir.*, 181 F. 2d 796, 798-799, cert. den. 340 U.S. 827. It is therefore clear from the language employed as it is from the authorities that the statute in terms contemplates review by this Court of definitive orders entered after hearing and upon completion of the administrative process. Applying this test to Order 174-A it is clear that it did not result from such a hearing upon evidence, and the regulations prescribed therein do not constitute "findings." Indeed under the rule-making power granted in Section 16 of the Act, there was no requirement for either notice or hearing prior to the issuance of such regulations. So, irrespective of any label placed upon it by the Commission or the petitioners, we think it plain that the Commission has simply promulgated regu-

[8] The review provisions of the Natural Gas Act and the review provisions of the Federal Power Act which were at issue in the *Metropolitan Edison* case are identical in all pertinent respects. See 16 U.S.C.A. 825 l.

lations of general applicability and not an order reviewable under Section 19(b). The order does not change the petitioners' existing or future status or condition since it is not an adjudication that any particular natural-gas producer is a "natural-gas company" or an "independent producer." The definition of the latter as set forth in the order merely enunciates a classification of certain types of "natural-gas companies," but such a classification in a general regulation does not subject any person or corporation to the Commission's jurisdiction. If persons whose sales of natural gas are such as to bring them within the Commission's jurisdiction, this circumstance arises by reason of the Natural Gas Act itself and not by virtue of the order in question. Furthermore, Order 174-A is not a formal determination of any right or obligation; it is not self-executory and it does not command these petitioners to do or refrain from doing anything. The construction of the regulations and their application in particular situations is still in the hands of the Commission, and this being so we cannot under the limitations of Section 19(b) sit in judgment upon practical business consequences where the action to be reviewed does not represent a definitive ruling resulting from a hearing upon evidence. In fine, and as was pertinently pointed out in *Rochester Telephone Corp. v. United States,* 307 U.S. 125, 130, an order is not subject to review if it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province."

Much of the argument in these cases is centered around the proposition that Order 174-A is reviewable under Section 19(b) by virtue of the fact that the order requires and inhibits certain actions by the petitioners and has the immediate impact of the sort which led the Supreme Court in *Columbia Broadcasting v. United States, supra,* to regard particular administrative action as ripe for judicial

review. This argument presupposes that a parallel can be drawn between the order complained of in the *Columbia Broadcasting* case and the order sought to be reviewed here and that petitioners are entitled to the same relief under Section 19(b) as was afforded to appellant in *Columbia Broadcasting* under the review provisions of the Federal Communications Act. The argument is not persuasive. As we have previously said these regulations do not change petitioners' existing or future status and do not subject them to the Commission's jurisdiction. Order 174-A is not a formal determination of any right or obligation, is not self-executory, and does not command these petitioners to do or to refrain from doing anything. Whereas, in the *Columbia Broadcasting* case the very existence of the regulations had, without anything more, an immediate effect on the business of the party attacking them. Furthermore, reviewability under Section 19(b) is not equated with irreparable harm, and is not governed by the same tests as reviewability under Section 402(a) of the Federal Communications Act. Section 402(a), prior to its amendment in 1952, made applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" except orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operators license." Review of the orders excepted from the provisions of Section 402(a) was by appeal to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) and the review in the Court of Appeals was to be heard upon the record made at the hearing of an application by the Commission. In the *Columbia Broadcasting* case it was not contended by the parties that the controverted order promulgating licensing regulations was a Section 402(b) order and indeed it was not one. The three-judge District Court in its consideration of the questions there presented determined that it had no jurisdiction to hear the complaint brought by

Columbia Broadcasting System for the reason that it did not view the order in question as an "order" within the meaning of Section 402(a). The reasons set forth were that if any of the plaintiffs should thereafter apply for a renewal of licenses and the Commission then adhered to the policy ennunciated in the order in question, "the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing . . . Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues . . . Whatever may ordinarly be the proper scope of the word 'order' in the Act . . ., it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such 'orders'."[9] The questions thus posed to the Supreme Court on appeal from this decision were: (1) whether the order in question was an "order" within the meaning of Section 402(a), and (2) if it was such an order, whether the bill stated a cause of action in equity. Considerable doubt had been cast by the lower court's decision as to whether the issues raised in the complaint were relegated to review only after the entry of a Section 402(b) order in which the Federal Communications Commission had effectuated its announced licensing policy. In reversing the three-judge court the Supreme Court concluded that Congress had not precluded a review of these issues under Section 402(a), and held that the order there in question was a reviewable order within the meaning of that section and that the bill of complaint stated a cause of action in equity. In our view the *Columbia Broadcasting* decision adds nothing to petitioners case for review for the Supreme Court decided not whether the order was one subject to review in a court of appeals, but only that the order was an "order" which

[9] *National Broadcasting Co.* v. *United States*, 44 F. Supp. 688, 692.

could be attacked in a district court of three judges in a suit which states a cause of action in equity. Whether, as was suggested by some of the petitioners, Section 19(b) precludes injunction proceedings in a district court to restrain the enforcement of Order 174-A is not properly before us and consequently we need not resolve the apparent conflict in the authorities which bear upon this question.[10]

Having concluded that the orders in question are not reviewable under Section 19(b) of the Natural Gas Act, there remains for discussion the contention of three of the petitioners that we have jurisdiction to review their petitions under Section 10 of the Administrative Procedure Act. For answer we deem it sufficient to say that we are of the opinion that the latter Act adds nothing to our jurisdiction under the Natural Gas Act. Section 10 of the Administrative Procedure Act provides that its provisions are applicable "except so far as (1) statutes preclude judicial review . . ." and the Supreme Court in *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U. S. 492, characterized Section 19(b) as one of the statutes precluding judicial review within the meaning of that section.

In the light of the foregoing and since we hold that we have no jurisdiction to review the regulations in question at this time the other contentions raised by the parties, all of which have been carefully considered do not merit further discussion. Accordingly, separate judgments will be entered in each of these cases dismissing the petitions for review for lack of jurisdiction.

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BROWN, Circuit Judge, dissenting.

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[10] See *Federal Power Commission, et al* v. *Union Producing* Company, D.C. Cir., . . . . F. 2d. . . ., cert den.; *United Gas Pipeline Co.* v. *Federal Power Commission, supra*, . . . .F. 2d. . . .; *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 3 Cir., 124 F. 2d 800; *East Ohio Gas Co.* v. *Federal Power Commission*, 6 Cir., 115 F. 2d 385; *Carolina Aluminum Co.* v. *Federal Power Commission*, 4 Cir., 97 F. 2d 435.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15320

MAGNOLIA PETROLEUM COMPANY, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

No. 15321

THE OHIO OIL COMPANY, *Petitioners,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

No. 15352

THE SUPERIOR OIL COMPANY, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

No. 15354

WESLEY WEST, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

No. 15471

GULF OIL CORPORATION AND GULF REFINING COMPANY,
*Petitioners,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

No. 15470

THE TEXAS COMPANY, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

No. 15461

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY, *Petitioners,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

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No. 15704

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

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No. 15627

STANOLIND OIL & GAS COMPANY, ET AL., *Petitioners,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

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No. 15678

CONTINENTAL OIL COMPANY, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

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No. 15799

HUNT OIL COMPANY, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

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No. 15928

HUNT OIL COMPANY, *Petitioner*

versus

FEDERAL POWER COMMISSION, *Respondent.*

No. 15832

RALPH B. SHANK, Trustee for Nelson Bunker Hunt Trust Estate, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

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No. 15749

ROY LEE, Trustee for Hassie Hunt Trust, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

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No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY, *Petitioner,*
versus
FEDERAL POWER COMMISSION, *Respondent.*

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[Petitions for Review of Certain Orders of the Federal Power Commission sitting at Washington, D. C.]

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(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

It is with the greatest of deference that I feel myself under the overpowering compulsion of dissenting from my Brothers in these important and careully considered cases. My differences are deep and fundamental and rest not at all upon a criticism of these opinions which, with articulate craftsmanship, fairly and honestly set forth the principal facts and expound the contentions. It is my view that these decisions are too much the product of an excision under the artificial sterility of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission that these cases are not to be reviewed "in a

vacuum"—a figure with which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas.

We have been thrice-told, *Columbia Broadcasting System v. United States,* 316 U.S. 407, 86 L.Ed. 1563; *Frozen Food Express v. United States,* —U.S.—, —L.Ed.— [Nos. 158-161, October Term 1955, April 23, 1956]; *United States v. Storer Broadcasting Company,* —U.S.—, —L.Ed.— [No. 94, October Term 1955, May 21, 1956], that as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt.

It therefore seems remarkable to me that in thirty-six cases argued over a week's time presenting nearly every situation confronting the gas industry, the Court finds that not a single one is reviewable.[1] This is done, variously

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[1] If our decisions and Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F.2d 461, stand, there is no review of these substantial questions in sight, for Federal Power Commission v. Union Producing Company, D.C. Cir., 230 F.2d 36; Gulf Oil Corporation v. Federal Power Commission, D.C. Cir., 230 F. 2d 40, foreclose the equity injunction. During the four days' argument of these cases, I vainly sought from anyone or all of the battery of advocates for the Commission, even a hypothetical situation in which *some* gas producer involved in *some* situation could have *some* significant review. Apparently some slight character

stated, on the ground that none of these actions by the Commission is a definitive "Order" having requisite compulsory characteristics.

In my view that comes about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all of these cases in their major categories will demonstrate the practical decisive business consequences of these actions and, from the standpoint of the technical ripeness or sufficiency of a given case for present review, consideration of all will indicate clearly the existence of at least one case in which *each* significant point is adequately presented. In this analysis[2] and exposition, I approach each case from the standpoint of the basic question of reviewability and decline to find some way, either on the indicated merits or some procedural aspect, to deny review. When the Court is so overwhelmingly com-

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of "review" is given to the State Tax Escalation Cases (note 2, infra), but in the setting of the approach of nonreviewability in the fundamental jurisdictional situations and the complete bypassing of those problems (though present) in this one group, it indicates to me that in fact no review is really recognized even there.

[2] For convenience I group and refer to the cases in these categories: I. Order No. 174 Cases: No. 15320, Magnolia Petroleum Company; No. 15321, The Ohio Oil Company; No. 15352, The Superior Oil Company; No. 15354, Wesley West; No. 15471, Gulf Oil Corporation, Gulf Refining Company; No. 15470, The Texas Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. II. Suspension Cases: No. 15704, Humble Oil & Refining Company; No. 15627, Stanolind Oil & Gas Company; No. 15678, Continental Oil Company; No. 15799, Hunt Oil Company, No. 15928, Hunt Oil Co., No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. III. Abandonment Cases: No. 15832, Shank, Trustee; No. 14749, Roy Lee, Trustee. IV. State Tax Escalation Cases: Nos. 15706 through 15721, Continental Oil Company.

This division is for convenient, orderly presentation, but the entire opinion applies to all of the cases without regard to topical or category subdivisions.

mitted to a philosophy of nonreviewability that should be, and is, the point of our departure. As I adhere to this approach, comments or statements may frequently appear in which the merits of a particular contention are assayed. These are not to be understood as a variance from my method. They are put forward not to reflect either tentative, or final conclusions, a *pre* or partial judgment on them. They are put forward solely to put flesh on these bones, to show the vital impact of agency action and the existence of substancial, serious, frequently difficult questions.

THE STANDARD OF REVIEWABILITY

At the outset it is plain that, contrary to my Brothers, I find in *Columbia*[3] *Broadcasting System, Inc. v. United*

[3] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Columbia Broadcasting System, Inc. v. United States, supra, at 316 U. S. 425, 86 L. Ed. 1575. "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. * * * The regulations are not any the less reviewable because their promulgation did not operate of their force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract." *Id.* at 316 U.S. 417, 86 L.Ed. 1571. "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with the network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it. * * *" *Id.* at 316 U.S. 420, 86 L.Ed. 1573.

Federal Communications Com. v. American Broadcasting Co., 347 U.S. 284, 98 L.Ed. 699, reviewed and enjoined similar general regulations applicable to all. See also, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L. Ed. 817.

*States, supra,* ample basis for reviewability where regulations thought to be of far-reaching and perhaps devastating effect are yet couched in general terms and directed against no party in particular. Indeed, the presence in the Natural Gas Act[4] of substantial penalties for violation of the regulations brings these cases within the pre-*Columbia* law.[5]

Any lingering doubts must have evaporated with *Frozen Food Express v. United States, supra.* These regulations were surprisingly similar to those involved here. It was an *Ex Parte* proceeding, with the report, seventy-one pages in length, listing specific items determined by the Interstate Commerce Commission to be within the agricultural commodity exemption of Section 203(b)(6), 49 USCA 303(b)(6). Reversing a three-judge holding of nonreviewability on the rubric of *United States v. Los Angeles Rail-*

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[4] Section 21(b) (15 USCA 717t(b)): "Any person who wilfully and knowingly violates any rule, *regulation,* restriction, condition, or order made or imposed by the Commission under authority of this act, shall, *in addition to* any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500.00 for *each* and every *day* during which such offense occurs." [italics mine]

[5] Mr. Justice Frankfurter's dissent in *Columbia,* supra, 316 U.S. 429, 433, 434, 86 L.Ed. 1577, 1580, characterized the prior cases of reviewability, "In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency." His comment analyzing *United States* v. *Berwind-White Coal Mining Co.,* 274 U.S. 564, 71 L.Ed. 1204, as well as the other cases, *United States* v. *Baltimore & Ohio Railroad Co.,* 293 U.S. 454, 79 L.Ed. 587; *American Telephone & Telegraph Co.* v. *United States,* 299 U.S. 232, 81 L.Ed. 142; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U.S. 194, 56 L.Ed. 729; *Chicago, R.I. & P.R. Co.* v. *United States,* 284 U.S. 80, 76 L.Ed. 177; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 83 L.Ed. 1147, involving specific penalties for violation of regulations, is significant: "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." *Id.* at 316 U.S. 334-336, 86 L.Ed. 1580, 1581.

*road Co.,* 273 U.S. 299, 71 L.Ed. 651, the Court sustained reviewability since, "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * * Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'Order' of the Commission is in substance a 'declaratory' one * * * 5 USC 1004(d) which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. * * *"

And *Frozen Food* was followed shortly by Storer Broadcasting Company, *supra,* holding general regulations determining eligibility for TV station licenses were orders reviewable at the suit of one of that business prior to the denial of a specific license application for, the Court said, "The Rules now operate to control the business affairs of Storer. * * * Storer cannot cogently plan its present or future operations. * * * These are grievances presently restricting Storer's operations." The *Columbia*[6] doctrine

[6] The key to the majority's misreading of *Columbia* is found, I think, in the preoccupation in the Magnolia opinion (No. 15320) with some supposed peculiar difference between a Section 402(a) (Title 47 USCA 402) Urgent Deficiencies Act, (October 22, 1913, 38 St.L. 208, 219, Chap. 32) and a Section 402(b) review which, for all practical purposes, is the same as Section 19(b) here. Significantly, Mr. Justice Frankfurter in his *Columbia* dissent completely ignored that point and in neither of the dissents in *Frozen Food Express* or *Storer* is it even mentioned as a valid basis for distinction. In *Storer,* of course, it was our precise situation—a

has an expansive vitality to require that Courts view these matters in the light of a living world.

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statutory review by the Court of Appeals. In 402(a) and (b) and in 19(b), the requirement of an "Order" and the basis for reviewability is substantially the same. Scripps Howard Radio, Inc. v. Federal Communication Commission, 316 U.S. 4, 15, 16, 86 L.Ed. 1229, 1237, "It is urged that the orders reviewable under §402(a) * * * are intrinsically different from those reviewable under §402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform * * * As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington * * *." See also, Philadelphia Co. v. S.E.C., D.C. Cir.. 164 F.2d 889 at 897, cert. den. 333 U.S. 828, 92 L.Ed. 1114, subsequent proceedings, 175 F.2d. 808, reversed as moot 337 U.S. 901. 93 L.Ed. 1715.

Amshoff v. United States, 7 Cir., 228 F.2d 261, cert. den. 24 L.W. 3309, May 21, 1956, under the Hobbs Act, 5 USCA 1031, likewise reviewed. over the Administrator's contention that no definitive order had been entered, a general regulation which had the effect (as does much of the 174 Orders here) of repudiating an old and adopting a new administrative substantive policy.

The majority's emphasis (Magnolia 15320) on the requirement for, "A transcript of the record upon which the order complained of was entered" and the usual situation of an order, "of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case, Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 * * *" cannot, by a bootstrap-lifting process, defeat reviewability. The absence of a hearing, the receipt of evidence, the making of findings which is the very basis of much of the attack cannot thus be turned into a deficiency making it unreviewable, National Coal Association v. Federal Power Com., D.C.Cir., 191 F.2d 462, 466; Saxton Coal Mining Co. v. National Bituminous Coal Comm., D.C. Cir., 96 F.2d 517; American Sumatra Tobacco Corp. v. S.E.C., D.C. Cir., 93 F.2d 236; Philadelphia Co. v. S.E.C., supra; see also, Columbia Oil and Gasoline Corp. v. S.E.C., 3 Cir., 134 F.2d 265, 267. And, of course, where validity of regulation presents question of law on the face of the orders or regulations a "record" of evidence is not needed, see discussion of cases under II, Suspension Cases, infra.

## I.

### Order 174 Cases

A consideration of but a few parts of Orders 174 A or B will demonstrate, I think, that the action of the Commission has tremendous practical, direct business consequences on those who produce natural gas.

*The Order Determines Who Is Subject to the Act*

When it is recalled that the whole sweep of the 174 Orders is to outline action to be taken by those brought under the Act by the Phillips decision, the definition[7] of "Independent Producer" has a positive and practical effect on the industry. This is so because it is the imprimatur of the Commission itself on the Phillips decision and, more so, it is one of doubtful validity. The doubt arises because the definition comprehends all those engaged in the production or gathering of gas who sell it in interstate commerce for resale. By its terms no distinction is made between those who sell *before* and those who sell *after* the production and gathering is completed. The regulation therefore reflects the Administrator's interpretation[8] of

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[7] §154.91 " 'Independent producer' as that term is used in these Rules means any person as defined in the Natural Gas Act who is *engaged in the production or gathering of natural gas* and who transports natural gas in interstate commerce *or sells* natural gas *in interstate commerce for resale*, but who is not primarily engaged in the operation of an interstate pipeline." [Italics mine]

[8] Original Order 174 in the prefatory portions stated: "The decision of the United States Supreme Court on June 7, 1954, in Phillips Petroleum Company v. Wisconsin et al (347 U.S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or make sales in interstate commerce for resale are 'natural gas companies' subject to all the requirements of the Natural Gas Act. * * *"

In the Commission's brief in No. 15471, Gulf Oil Corporation, pages 1 to 3: "* * * These orders [174] stem directly from the decision of the Supreme Court in Phillips Petroleum

an opinion which is, or may be, read much differently by others.

Whatever else the Court meant to say or do, it seems plain to me that the Court was being careful to point out that sales made during production or gathering were not within the scope of the decision:

> "* * * production and gathering in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur." 347 U.S. at 678, 98 L.Ed. at 1045.

Nothing in that opinion[9] impairs the authority of its prior holdings that Secton 1(b) "* * * precludes the Commission

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Co. v. Wisconsin * * * in which that court held that the Commission has jurisdiction over independent producers which engage 'in "the sale in interstate commerce of natural gas for resale," and that such a company' is a ' "natural gas company" within the meaning of that term as defined in the Natural Gas Act' (p. 677). By these orders the Commission * * * promulgated general rules and regulations to be applicable to natural-gas companies which were also independent producers subject to Commission jurisdiction under the Act. * * * * * * the Supreme Court held in Phillips Petroleum Co. v. Wisconsin, * * * that sales in interstate commerce for resale by producers and gatherers to interstate pipeline companies do not come within the 'production or gathering' exemption, but that producers and gatherers making such sales also are 'natural-gas companies' under the Act, and the Commission has the authority to regulate such sales."

The Commission's brief in Magnolia No. 15320, page 4: "* * * the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, including such sales in the area of production and gathering * * *."

This "extreme" view of the Phillips decision was successfully pressed by the Commission in Federal Power Com. v. J. M. Huber, D.N.J., 133 Fed. Supp. 479 (now on appeal Third Circuit).

[9] In the Phillips case (347 U.S. at 678, 98 L.Ed. at 1045-1046), the court reaffirms the previous cases on Section 1(b): "In Federal Power Commission v. Panhandle Eastern Pipeline Co. 337 U.S. 498, * * * we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties

from any control over the activity of producing or gathering natural gas", *Colorado Interstate Gas Company v. Federal Power Commission,* 324 U.S. 581, 603, 89 L.Ed. 1206, 1223; that the Commission has no power "* * * to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern", *Interstate Natural Gas Company v. Federal Power Commission,* 331 U.S. 682, 690, 91 L.Ed. 1742, 1748; that the regulations of the Commission may not be "* * * inconsistent with the exercise by [the states] * * * of the powers over production and gathering of natural gas reserved to it by Congress in §1(b) of the Act", Id. at 331 U.S. 691, 91 L.Ed. 1748.

It is because of the genuine and reasonable basis for difference in the interpretation of the Phillips opinion that the regulatory definition has such an impact. Until there was an administrative definition describing those persons who would come within the meaning of the Phillips decision, it would be a matter of individual interpretation. Even though it were ultimately determined by subsequent proceedings that such interpretation was the correct one, no one in the interim could have been subjected to penalties for the violation of a regulation (since none existed) and the continued reasonable doubt about the interpretation itself would prevent the severe penalties for a criminal violation under Section 21(a), 15 USCA 717t (a).

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and gathering facilities of a natural gas company'. Similarly in Colorado Interstate Gas Co. v. Federal Power Com. 324 U.S. 581, 598 * * * we stated that '[t]ransportation and sale do not include production or gathering', and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. *Id* 324 U.S. at 602, 603. See also, Federal Power Com. v. Hope Natural Gas Co. 320 U.S. 591, 612-615, 88 L.Ed. 333, 350-352 * * *; Peoples Natural Gas Co. v. Federal Power Com. 75 App. D.C. 235, 127 F.2d 153; cf. United States v. Public Utilities Com. 345 U.S. 295, 307-311, 97 L.Ed. 1020 * * *."

But with the definition by regulation, all of that is removed. All that is left now for the individual is the ultimate validity of that definition. By force of this definition, one who produces natural gas and sells it for resale in interstate commerce is conscious that he is then subject to the Act and must conform all of his activities to it and must take the specific action which other sections of the Order command. I shall show in subsequent detail what these are, but even without this, it is completely unrealistic to say that profound consequences are not imposed when the Order, at its outset, transmutes, for example, the owner of the working interest in a small gas well from a simple entrepreneur into a quasi public utility. Like the trucker who hauled grapefruit and seeks frozen chickens to eliminate a dead haul, cf. *Frozen Foods, supra,* this act of Government has changed his whole economic life.

*The Order Requires Filing Of Rate Schedules*

In the face of the positive command for the filing of rate schedules[10] as of June 7, 1954, by all "Independent Producers", it is difficult for me to follow the majority's statement (Magnolia No. 15320), "* * * Order 174-A is not a formal determination of any right or obligation; is not self-executory, and it does not command these petitioners to do or refrain from doing anything. * * *"

Since the Order (§ 154.92) is directed to an "Independent Producer" who is, in turn, defined in § 154.91 to be those

[10] Order 174 A, Section 154.92, "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, [subsequently changed to December 1, 1954] file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such * * * sale effective on June 7, 1954. * * * (b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate * * * sale * * * to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days * * * a rate schedule * * *."

who make interstate sales while producing and gathering, this regulation is an immediate, positive, firm, absolute requirement for the filing of rate schedules. It is plain and unequivocal in its terms, and being a regulation, it subjects those who fail to comply to the severe penalties (note 4 *supra*) of "$500.00 for each and every day during which such offense occurs." Not only does it subject the producer to fines and penalties, but the filing of these contracts by its nature turns his business into one of public concern. What was the moment before Order 174 his business, now becomes the Commission's business. It may be that ultimately that is what the Phillips decision intended and the regulation will have a validity to achieve that end. But that does not remove the fact of the impact of this regulation upon this business man. It, and it alone, compels him under the pain of immediate penalties to alter his whole business concept.

And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.[11]

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[11] Section 4(c) of the Act: "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such *time* * * * and in such *form* as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *." [Italics mine]

Whatever may be the juridical metaphysics, e.g., Douglas v. County of Pike, 101 U.S. 677, 25 L.Ed. 968; Norton v. Shelby County, 118 U.S. 425, 30 L.Ed. 178, of what the 1954 Phillips decision did to a 1938 Act, it is plain that the Commission never claimed that it had the right to or was regulating these independent producers, Columbian Fuel Corporation, 2 FPC 200; Fin-Ker Oil and Gas Production Co., 6 FPC 92; Chicago Corporation, 6 FPC 98; Phillips Petroleum Co., 10 FPC 246, and to suggest now that on the birth of *Phillips*, the general regulations covering interstate transmission pipeline companies applied automatically to these individual producers lacks genuine substance.

Moreover, this specific provision of the Order illustrates well the futility of later, or more, or subsequent proceedings which the Commission insists are necessary to satisfy the requirement of exhaustion of the administrative process. E.g., *Myers v. Bethelehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638; *Public Service Comm'n v. Wycoff*, 344 U.S. 237, 97 L.Ed. 291; *Canadian River Gas Co. v. Federal Power Commission*, 10 Cir., 110 F.2d 350, reh. den., 113 F.2d 1010, cert. den. 311 U.S. 693, 85 L.Ed. 449; *United Gas Pipe Line Co. v. Federal Power Commission*, D.C. Cir., 181 F.2d 786, cert. den. 340 U.S. 827, 95 L.Ed. 607. If a regulation is not valid either because it is too sweeping or, as claimed by some of these petitioners, it covers a person not within the Act, how is it to be tested? If the complaint is directed against a regulation compelling the filing of private papers, what more is needed to test that than the Order itself? What sort of administrative proceedings is reasonably needed if a citizen conscientiously thought that this provision of the Order was illegal? Must he surrender the very papers for public perusal which he contends are his own business? If he is hurt because he is threatened with the necessity of surrendering private documents, has it not become incurable if to test it, he must first comply?

*The Order Requires Filing of Changes in Rate Schedules*

Equally compelling, Section 154.94, is the imperative command that, "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate * * * sale of natural gas * * * by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the * * * Act and in accordance with this section."

No status determination is needed here. The definition is "Independent Producer" and a sale which makes him one under Section 154.91 is all that is needed. From that

moment on the regulation by its own terms is self-executing to impose the mechanical obligation of preparing and filing all such changes. Not only does that impose an obligation subjecting the producer to a $500.00 daily fine for non-compliance, but this has an immediate effect in circumscribing the nature and extent of his business negotiations, transactions, and agreements which he may make, or desire to make, with present or prospective customers. Surely an Order which states that no change can be made unless it is first filed has real and far-reaching effects. The very imminence of such a regulation calls for the immediate reconstruction of one's business. In the fundamental concept of its nature, it has, in the twinkling of an eye, ceased to be private and now becomes clothed with a certain public interest, or at least a certain public control.[12]

*The Order Prohibits Automatic Contract Escalations*

Here, without a doubt, the regulations promulgate a new and revolutionary policy having substantive consequences of great importance. For the Order, in connection with its requirements concerning the filing of rate schedules and changes in rate schedules, categorically states that contract escalations are a change of rate.[13] This has a

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[12] It should be borne in mind that questions of this type stated in emphatic terms are not to be taken as a conclusion that such Governmental supervision is wrong or invalid, or that the regulation is. We are here concerned only with an analysis of the Court's theme that Order 174 has no effect upon, does not require action by, these petitioning gas producers.

[13] Section 154.94 (Order 174 A): "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule."

Substantially the same provision is contained in Section 154.94(c) of Order 174 B except that this Section has been made even more specifically applicable to price changes pro-

substantial and immediate twofold impact: first, from a technical, procedural point of view, it has the effect of making the escalated rate a "new" or initial filing under Section 4(d)(e) with the complex problems of burden of proof and interim suspension flowing from that; and, second, the inability of the parties as a matter of actuality to enjoy the complete, prompt and uninterrupted performance of the agreements as made by them.

At the heart of both is the fact that, " • • • the Act, • • • evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates • • • may be set by individual contracts • • • The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. • • • By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *United Gas Pipe Line Company v. Mobile Gas Service Corporation,* —U.S. —, —L.Ed.— [No. 17 and 31, October Term 1955, February 27, 1956].

The petitions before us adequately show that these gas producers each have long-term contracts with various gas purchasers, interstate transmission pipeline companies in

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vided for in an "initial rate schedule." In addition, Order 174 B, Section 157.25, condemns, in advance, escalator clauses in producer contracts submitted in support of applications for Certificates which would, of course, affect interstate transmission pipeline companies, since long-term contracts for their essential gas reserves which have heretofore contained escalation clauses (see note 14 infra) could no longer contain them. This is thus a radical departure on a wide front from former substantive policies.

which, following the traditional usage of the industry with the full approval of regulatory agencies, provision is made for the automatic increase in the price of the gas under the stated conditions. The escalation provisions are the direct outgrowth of the necessities of the contract and of the pipeline purchaser. Those proposing an interstate transmission pipeline must have two principle things: one, financing in astronomical sums, and, two, certificates of public convenience and necessity from the Commission. Investment bankers and underwriters of these securities require long-term supply and outlet commitments to justify the economic forecasts of the promoter. And the regulatory agency which, by the Certificates both approves the construction of the line and the issuance of securities for its financing, demands a like showing to establish fitness, ability and capacity to serve.[14]

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[14] Reference here to the Suspension Cases, and particularly Stanolind (No. 15627) and Continental Oil Co. (No. 15678), involving as they do gas from the Woodlawn Field, Texas, removes this from the dreaded vacuum. The Federal Power Commission in the Mississippi River Fuel Corporation case (Docket G-1281, et al) in 1952 stated: "The most important matter presented for consideration in the instant Mississippi certificate proceedings concerns the adequacy of the gas supply showing made by Mississippi in support of its proposed system expansion. The importance of an adequate gas supply showing has been stressed by the Commission in certificate proceedings, since every certificate of public convenience and necessity under the Natural Gas Act must be based upon appropriate findings, among others, that the applicant for such certificate is 'able and willing properly to do the acts and to perform the service proposed.' 'An adequate gas supply', as the Commission stated in its Opinion No. 230 and Order of June 24, 1952, *In the Matter of Northern Natural Gas Company*, Docket No. G-1618 * * *, 'is the bedrock upon which such findings must be grounded.' 'A gas supply can be considered adequate,' as the Commission further stated in the *Northern* case, *supra*, 'only if the volume available is sufficient to meet the demand requirements for the service proposed, if such volume is assured over a sufficient period of years to justify the expenditures required for the construction of the proposed pipe-line project, and if that assurance of a continuing supply of natural gas meets the

The imperative requirement that the purchaser have a long-term contract makes it essential that, in the ordinary course of business judgment, the seller have some means of protecting himself against the unpredictable fluctuations or developments in the twenty-year period. These take the form normally of automatic step increases in price at stated times or intervals and "Favored Nations" clauses, single or general, to assure that the seller has the opportunity of enjoying the general increase in the value of gas in the area, reflected by genuine, good faith transactions or tenders, and, invariably, for proportionate increases in production, severance, or similar state taxes.

The immediate effect of this Order is, therefore, to destroy the binding character of the agreement made be-

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requirements of public convenience and necessity. Generally, a supply of natural gas should be assured for a period approximating fifteen to twenty years, dependent upon the particular facts involved, if the pipe-line project is to be economically sound and in the public interest and if the natural-gas company is to be in position to meet its obligations to investors and provide dependable service to consumers.'" The Commission then recited that they had previously found Mississippi's supplies inadequate but allowed additional time to correct it. Acquisition of additional reserves is approved: "* * * At the 1952 hearings Mississippi showed that it had entered into additional gas purchase contracts, covering the purchase of gas in the * * * Woodlawn gas fields in Texas * * *. These contracts are for primary terms of 20 years and provide prices ranging between 10.88c and 12.46c per Mcf * * * at the beginning of their terms, and thereafter higher prices are specified. * * *"

Another Suspension Case, Union Oil (No. 15461), involves suspension of escalated rates under a long-term contract with Transcontinental Pipe Line Company resulting from a renegotiation of the contract long prior to June 7, 1954, made primarily to meet the objections of the Federal Power Commission in Dockets No. G-2367 and G-4185 (see opinions No. 279 and 280, December 1954, March 1955, respectively) to sufficiency of gas reserves. After restudy of the gas supply reserves showed them to be 16.6 to 17.9 years, Transcontinental's application for certificate to build and finance facilities costing approximately $40,000,000.00 to compete for the rich New York market area was approved.

tween seller (producer) and purchaser (pipeline). The rate may ultimately be the same, but only after someone has convinced the Commission, or Court, or both that what the parties agreed to do was fair, just and reasonable.

The Commission seeks to avoid this impact by insisting that the contract "rate" preserved by *Mobile, supra,* is the one being charged at the particular time and that what is payable before or after is of no consequence. That may ultimately be the rule of law. But it is not the rule of business and to assert it by this Order subjects these parties to real and damaging and pressing results. It be comes all the more devastating when, as I shall later discuss, we consider the effect of the Order requiring that an Independent Producer file an application for a Certificate of Public Convenience and Necessity to institute a sale and secure approval before he may abandon it. For here, by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered as individual enterpriser under no Governmental restraint or regulation, is suddenly informed that the contract rates to be paid to him in the last half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well.

And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television station owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, *Frozen Foods, supra, Storer,*

*supra,* I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid—it simply is that as long as it stands undetermined all business is unavoidably affected by it.

Until this regulation is tested and the validity of this policy is determined, a major industry must speculate. This is a serious and troublesome point of law which a Court must and may determine. These Order 174 Cases and the Suspension Cases present it adequately for in both the Order does have an immediate, far-reaching consequence.

Nor can the impact of this pervasive policy against contract escalations be avoided or lessened by self-help,[15] since

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[15] It is doubtful that Government (Administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality. "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. * * *" Columbia Broadcasting System supra, 316 U.S. at 418, 86 L.Ed. at 1571.

the customer (purchaser) of one of those producers is invariably an interstate pipeline transmission company and, being licensed under Certificates issued by the Commission, it is forbidden in fact and practice to pay more for its gas requirements than approved contracts permit. The present customer (purchaser) under an existing contract cannot pay more even though it is in accordance with its agreement and it desires to do so, and the seller (producer) can find no relief by a termination of the contract since, as we shall see, Commission consent is demanded under the Order for termination or abandonment.[16]

This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the administration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract rate increase, a "change in the rate schedule." If it is a "new" rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable.[17] On

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[16] This is what the producers sought to do in the Abandonment Cases (Lee, Trustee, 15749; Shank, Trustee 15832), but which, for nearly two years, the Commission has thus far prohibited.

[17] Section 4(e), "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, * * * pending such hearing * * * may suspend the operation of * * * such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, * * *"

the other hand, if the automatic escalation increase is but a part of the entire total contract rate,[18] the application of the automatic increase is not the promulgation of a *new* rate, and the review[19] of such rate would be by a hearing pursuant to Section 5(a).

The Suspension Cases before us and the administrative experience[20] of the Commission demonstrate that this is

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[18] United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 86 L.Ed. 855, 862: "The Master and the courts below, however treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatver, if any promise or set of promises were struck out.' Williston on Contracts, Rev. ed. §863 and cases there cited."

[19] "The powers of the Commission are defined by Sections 4(e) and 5(a). The basic power of the Commission is that given it by §5(a) to set aside and modify any rate or contract * * *. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long established or newly changed, but in the latter case the power is further implemented by §4(e). All that §4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * the further powers (1) to preserve the status quo * * * by suspending its operation * * * and (2) thereafter to make its order retroactive, by means of the refund procedure * * *." United Gas Co. v. Mobile Gas Corp., supra. [Italics by the Court]

[20] The Commission's letter report May 4, 1956, to Senator Gore revealed 191 cases involving annual increases (not including state tax increases) of $18,737,482.00 in which escalation rate increases have been suspended and hearing or decision is pending. Presumably, at least 5/12ths (5 months maximum suspension period) of this is an irretrievable loss to producers even though the Commission ultimately approves the increased rate. Apparently only 39 cases have been disposed of involving $3,218,297.00 annual increases, and

no idle, academic, theoretical difference. It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's.

The Order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of the regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the "new" rate, if the purchaser would pay it, would be another violation. Substantial doubts exist concerning the validity of the regulation. The doubt arises on its face. The danger and consequence, if invalid, is pressing and immediate. And no further record proof or evidentiary facts is needed to make it ripe for judicial determination.

*The Order Requires Application for Certificate of Public Convenience and Necessity*

*The Order Forbids Abandonment-Termination of a Sales Contract without Commission Approval*

The purpose of the Commission to bring all producers within the scope of its interpretation of the Phillips case (defined in Section 154.91) and to subject all such producers to the severe obligations of a public utility is manifest by Section 157 of the Order. Certificates of Public

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the Examiner's reports and Commission decisions thereon submitted as typical examples of the Administrative problems indicate the complex matters which an applicant must face and perhaps shoulder in showing the proposed increase to be just and reasonable, e.g., is a fair price to be determined by the going price in the field? By invested capital, and if so, upon what basis, per well, or field, or unit? By a desired rate of return and if so, what percentage and upon what base?

Convenience and Necessity[21] must be obtained for each service and the service may not be abandoned[22] without Commission approval.

As in the case of other sections of the Order which I have discussed, the regulation has a force transcending the Act. In the absence of a regulation, it is left to the indi-

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[21] Section 157.23(a): "Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission * * * shall * * * file with the Commission an application * * *. (b) No independent producer of natural gas shall, * * * engage in any new service with respect to the * * * interstate * * * sale of such natural gas for resale in interstate commerce * * * without approval of the Commission, evidenced by a certificate of public convenience and necessity * * *". The contents of the applications are carefully prescribed concerning exhibits, technical data required, etc.

[22] Order No. 174 A provided: Section 157.28 "No independent producer as defined in Section 154.91 of these rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained * * *."

In Order No. 174 B this was changed by substituting the words of Section 7(b) of the Act and adding the proviso: "*Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas."

The Abandonment Cases before us and other administrative action taken indicates that in the administrative application by the Commission there is no difference between 174 B and 174 A for sales are considered "service rendered by * * * such facilities" and abandonment of a sales contract by an "Independent Producer" is forbidden: see J. M. Huber Corp. and Northern Natural Gas Co. v. J. M. Huber Corp., Dockets No. G-4326 and G-4957, Federal Power Commission v. J. M. Huber Corp., D.C.N.J., 133 F. Supp. 479 (now pending Court of Appeals, Third Circuit, No. 11799, argued June 18, 1956); Skelly Oil Co. and Lone Star Gas Co. v. Skelly Oil Co., Dockets No. G-5380 and G-5260; Argo Oil Corp., et al, Dockets No. G-6810, G-6811, G-2591 and G-2950.

vidual gas producer to determine whether he comes under the Act, is a natural gas company, whether the Act (Section 7(c)) is to cover sales, whether the sale is one bringing him within the Act or the Phillips decision and, on termination or abandonment, whether the sale is a service rendered by means of jurisdictional facilities. If he or his lawyer guess wrong, he is exposed to the possibility of enforcement proceedings (Section 20), or criminal prosecution (Section 21(a)) for "willfully and knowingly" doing an act "declared to be unlawful", or as one who "omits or fails" to do an act "required to be done."

But with the regulation, all this is removed. It peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing, or the commencement of a new, service without it and forbids termination. Failure to comply subjects the person automatically to the penalties of $500.00 for each and every day during which noncompliance continues (Secton 21 (b)). And all that would be open to determination would be the validity of the regulation.

It is just as obvious that these dual commands subject those in the gas business to substantial and immediate business consequences. As to existing contracts, the seller (producer) is helpless in his effort to enforce the mutual obligations for automatic escalation rate increases. His purchaser may not pay him the agreed increase. He must file his application as an "initial" rate under Section 4 and suffer the risk of a suspension and the burden of establishing the reasonableness of the rates. His only relief of self-help—that is, termination—is denied him because he must obtain Commission consent here as well. Whether as to existing contracts or the making of new ones, a producer knows that this subjects him to the far-reaching responsibilities of a public utility—a status which courts are reluctant to impose because of the inevitable encroachment upon normal business freedom unless the statutory command is clear, *Munn v. People of the State of*

*Illinois,* 94 U.S. 113, 24 L.Ed. 77; *Wolf Packing Co. v. Court of Industrial Relations,* 262 U.S. 522, 67 L.Ed. 1103. All persons dealing with a defined gas producer, whether banker, investor, processor, transporter, or purchaser, would of necessity have to trim negotiations and the final agreement to the pattern of public utility and its potential governmental regulation. Business men would know this instinctively. Judges, I think, should know as much.

And yet there is, at least, a substantial question whether the Act justifies a regulation imposing this *status* on the mere sale of gas, even one within the orbit of the Phillips case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities.[23]

There is even greater doubt concerning the right to forbid or regulate abandonment of sales since the Act[24] relates expressly to service by jurisdictional facilities. The

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[23] The command to apply for a certificate is found in Section 7(c). Its opening sentence restricts it to the completion of proposed facilities: "No natural-gas company or person which *will be* a natural-gas company *upon completion* of any *proposed construction* or extension shall engage in the transportation or sale of natural gas * * *." (Italics mine) This was the amendment of February 7, 1942, Public Law No. 444, 77th Congress, Chapter 49, Second Session [H.R. 5249], 56 Stat. 83. In its original form the Act required a certificate only when a company was entering a "market in which natural gas is already being served by another natural-gas company * * *" As investors and promoters were unwilling to risk the building of a line unless the statutory condition were met, it resulted in invariable hearings to prove the negative. The amendment was sought by the Commission to require certificates in the case of all *construction,* see hearings on H.R. 5249, 77th Congress, page 15 et seq.

[24] Section 7(b), "No natural-gas company shall abandon all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities * * *." [Italics mine]

Congressional purpose[25] to restrict the prohibition against abandonment to services rendered by jurisdictional facilities seems quite plain and is, interestingly enough, apparently acknowledged by the Commission.[26] If, then, the proper construction of 7(b) is that it relates only to services rendered by jurisdictional facilities, the regulation would be invalid in prohibiting termination of sales contracts unless the given sale was accomplished through physical facilities owned or operated by that producer in the performance and rendition of the sale and such facilities were "subject to the jurisdiction of the Commission."

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[25] The Act originated in H.R. 5423, 74th Congress, as amendments to the Public Utility Act of 1935 with a "facilities" provision identical with Section 7(b) (see hearings H.R. 5423, 74th Congress, 1st Session, pages 32, 44, §305(b)); the next bill, H.R. 11662, 74th Congress, 2nd Session, contained no prohibition on abandonment and representatives of the State Commissioners proposed an amendment that, "No gas company * * * shall discontinue service * * *," but this was rejected and language of present §7(b) was used. In the 75th Congress, 1st Session, on H.R. 4008, efforts by the New York Public Service Commission to obtain an amendment, "No natural gas company shall abandon service to any of its customers * * *" failed, and H.R. 6586, 75th Congress, 1st Session, which became the Act, contained the language now found in §7(b). The Committee report, No. 709, 75th Congress, 1st Session, stated, "Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission * * *."

[26] By letter, June 17, 1955, from Chairman Kuykendall, Federal Power Commission, to Chairman of the Senate Committee on Interstate and Foreign Commerce, amendment of Section 7(b) was proposed to make clear "* * * that the Commission is authorized to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers." See hearings, 84th Congress, 1st Session, on S.712 et al, pages 1234, 1235. No such bill was passed. Apparently the Commission has sought from Congress legislation designed to impose a general service obligation, see hearings, 80th Congress, H.R. 4051, pages 99, 100, 428-430, 461-462, and has sought to amend Section 7(b), see Annual Reports 1951 at page 145; 1952 page 152; 1953 page 155; 1954 page 170.

And finally, the petitioners urge with much basis, the *sale* of gas by a producer from a producing well is a direct and immediate part of production and is therefore within the full protection of Section 1(b). Nothing in the Phillips decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L.Ed. 1499.[27]

If, without let or hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases—that is, the right to the gas—because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or to the other.

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[27] The Commission's Order forbidding the transfer of leases was reversed: "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act * * * In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 89 L.Ed. 1206 * * * we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of Congressional intent. Of course, leases are an essential part of production. * * * The Federal Power Commission leans heavily upon Section 7(b) * * *. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'" Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, at 337 U.S. 504-509, 93 L.Ed. 1504-1507. And see Colorado Interstate Gas Co. v. Federal Power Commission, supra, Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 91 L.Ed. 1742; Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L.Ed. 333, approved expressly in the Phillips decision.

The present Order forbids this. It is ever-present in the shaping of gas transactions. And in the Abandonment Cases before us, it has kept particular gas producers from enjoying the fruits of and complying with the contracts made by the new purchasers with consequent substantial money losses.

*The Order Compels Other Action*

By operation of the Order, the magic date of June 7, 1954, is of critical importance. If it is valid, it orders a roll-back of rates to a prior date. Imposing a retroactive rate which is beyond the general power of the Commission subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judivial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed.

## II.

### Suspension Cases

In each of the Suspension Cases, the producer sought to collect the increased rate resulting from automatic contract escalation provisions. These rate increases were treated as "new" filings under Section 4 and were suspended for various periods of time. As thus presented each involves the question discussed at length concerning the nature of escalation increases and the Commission's power to forbid them. That is a serious question of law with substantial arguments on both sides. If what I have said is correct, then these petitioners in the Suspension Cases are certainly aggrieved and, as to them, the question is ripe for judicial review.

But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) "Order." In my judgment, this ignores the significant absence of any modifying term such as "final" in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commission has no power to award reparations or to impose out of current rates an amount needed to make up for a past deficiency due to an improvident suspension.[28]

Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that "facts" are needed to

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[28] Federal Power Commission v. Hope Natural Gas Company, supra; State Corporation Commission of Kansas v. Federal Power Commission, 8th Cir., 215 F.2d 176; Hope Natural Gas Company v. Federal Power Commission, 4th Cir., 134 F.2d 287, 310, "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission * * * regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission * * * As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates."

prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Administrator can not claim he lacked power to do what was done.

Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has expired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company v. Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably final. When one seeks a judicial review of an order assumed to be invalid because it forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes.

Precisely this problem—an illegal suspension order—was presented in *Atlantic Seaboard Corporation v. Federal Power Commission,*[29] 4th Cir., 201 F.2d 568, and jurisdiction under Section 19(b) was sustained. I have searched

[29] To the familiar lament from the Commission, the Court stated at 201 F.2d 572: "We are not impressed with the argument that we are without jurisdiction in the premises * * *. The Commission argues that the order which we are asked to review is not a definitive or final order * * *; but our power to review is not limited to final orders. * * * The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definite to justify us in exercising the power of review vested in us by the statute."

in vain for those facts or legal principles which have led my Brothers to state, "We think that case is clearly distinguishable from the case at bar." And to it may now be added *Phillips Petroleum Company v. Federal Power Commission,*[30] 10th Cir., 227 F.2d 470. See also, *Isbrandtsen Co., Inc. v. United States,* D.C.Cir., 211 F.2d 51, cert. den. 347 U.S. 990, 98 L.Ed. 1124; *Algonquin Gas Transmission Co. v. Federal Power Commission,* 1st Cir., 201 F.2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow.[31]

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[30] The same objection was made: "Reviewability is thus not strictly limited to final orders. * * * And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See Atlantic Seaboard Corp. v. Federal Power Commission, 4th Cir., 201 F.2d 568; * * *. The Orders sought to be reviewed here do not deal with the merits of the proceeding before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 * * * the legal consequences which attach to these orders have conclusive effect on the rights and duties of Phillips as an independent producer * * * and they are therefore reviwable." 227 F.2d at 474.

[31] See Amarillo-Borger Express v. United States, N.D. Tex., 138 F. Supp. 411, expressly approved and followed in Long Island Railroad Company v. United States, E.D.N.Y. [Civil Action 16321, May 9, 1956] . . . . F.Supp. . . . ., (statutory three-judge courts), in which an illegal revocation of a suspension order by the Interstate Commerce Commission was enjoined. The extensive materials dealt with under the Administrative Procedure Act raises considerable doubt in my mind that the Court's action here, in rejecting the Administrative Procedure Act, is correct. Of course, reviewability depends on the statutes and not what the parties say they invoke. See footnotes 2, 3 and 4, United States v. Storer Broadcasting Co., supra.

Nor, in my view, does reviewability of the Suspension Cases depend finally on invalidity of the regulation forbidding automatic escalation. The parties raised other and substantial questions concerning the sufficiency of the administrative process. These include the repeated use of stereotyped suspension orders magnified in several instances by other stereotyped denials of rehearing and whether such rubber-stamped treatment met the demands of the statute that the Commission, in suspending, shall deliver "to the natural gas company affected thereby a statement in writing of its reasons for such suspension", Section 4(e); *Amarillo-Borger Express v. United States, supra,* and *Long Island Railroad Company v. United States, supra.* And, as to at least two of them (Stanolind 15627 and Continental 15678), the action bordered upon complete administrative irresponsibility since for the very same contracts covering the very same gas out of the very same wells, the Commission found, in the stereotyped rubric, that the identical rate should be suspended as to one seller but not as to a co-seller. In this and the other respects the State Tax Escalation Cases likewise fit in this category.

## III.

### Abandonment Cases

In each of these cases, the producer (seller) had a right under the contemporary contracts to terminate the sale of gas. In one there was the right to obtain an increase in the price if bona fide offers were available from others. The current customer declined to meet the tendered increase, and the producer sought to exercise the contract right of termination and sell gas in the future to the new purchaser at the increased price. In the other, the producer sought to exercise his contract right to select his own purchaser and conclude a gas sales agreement with that new purchaser. By whatever label described, the letters and orders of the Commission have effectually prevented the producer from exercising the right to terminate, that is, abandon the

sales contract. This is done pursuant to the indicated sections of Order No. 174. If, as the analysis indicates, there is substantial doubt that Section 7(b) covers sales when no jurisdictional *facilities* exist, that order is an illegal one depriving the petitioners of immediate, substantial benefits. If that order is illegal, it is so because of the limited nature of Section 7(b), and no facts, no evidence, no record is needed or essential to an orderly presentment of that substantial and serious question.[32]

By virtue of Section 154.97 (cancellation of rate schedules) and Section 157.23(b), it was likewise necessary for these petitioners to file notice of termination of rate schedules and a request for the issuance of a new Certificate of Public Convenience and Necessity for sale of the gas to the new purchaser. If, on the analysis I have set out, these regulations are beyond the power of the Commission, it means that by their operation, the petitioners have been deprived of the immediate enjoyment of their private contract rights. That issue is present and has immediate consequences.

## IV.

### State Tax Escalation Cases

These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. The Court in arriving at a decision, presumably on the merits, completely bypasses this question. If, as my discussion indicates, that order may be invalid, then the

[32] On the review, if granted, there would be a substantial question whether the Commission had the right to "reject", as they did, one or more of these filngs. Mississippi River Fuel Corp. v. Federal Power Commission, 3 Cir., 202 F.2d 899.

Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954). (I do not decide this question since I think it too important to determine until we, as a Court, reach it for deliberative joint judgment.) Moreover, the Court's opinion in emphasizing the fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof. Finally, while the transmutations of the order and the change of dates from September 15 to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions. Conceding, for the moment, that there was intended significance in what appears to me to be inadvertent scrivener errors made under circumstances of understandable and almost hysterical pressure, I would have considerable doubt that a Commission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity. Finally, since the Court does reach some of the merits here, I can find in the record no basis for assuming that the sales involved in these contracts were within the jurisdiction of the Commission. Such findings and evidence is necessary. *Securities Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626; *Stark v. Wickard*, 321 U.S. 288, 80 L.Ed. 733; see also, *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 512, 92 L.Ed. 128, 135.

I have written at such length as my views in all cases because I think these many troublesome legal questions are begging for a Judge's answer. What the answers will be, I do not know. But the Commission by its 174 Orders and action in the individual cases has presented cases ready and ripe for adjudication.

We shut ourselves off from life if we think that that which has had the gas business in such turbulence has, as yet, no affect or impact.

I therefore respectfully dissent.

## APPENDIX B

### Judgment.

EXTRACT FROM THE MINUTES OF JUNE 30TH, 1956

THE TEXAS COMPANY

VERSUS

FEDERAL POWER COMMISSION

No. 15470

This cause came on to be heard on the petition of The Texas Company for a review of Orders of the Federal Power Commission entered on August 6, 1954 and December 17, 1954, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, dismissed for lack of jurisdiction.
"Brown, Circuit Judge, dissenting."

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### ORDER DENYING REHEARING

EXTRACT FROM THE MINUTES OF AUGUST 21, 1956

THE TEXAS COMPANY

VERSUS

FEDERAL POWER COMMISSION

No. 15470

As neither of the judges who concurred in the decision of the Court in the above numbered and entitled cause is of opinion that the petition for rehearing should be granted, it is ordered that the said petition be, and the same is hereby, DENIED.

"Brown, Circuit Judge, Dissents."

## APPENDIX C

### Excerpt From The Fifth Amendment To The Constitution Of The United States

No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX D

### Excerpts From the Natural Gas Act

**Pertinent Provisions of the Natural Gas Act (52 Stat. 821-833; Title 15 U. S. C. §§ 717-717w) and Amended February 7, 1942 (56 Stat. 83-84; Title 15 U. S. C. § 717f), and July 25, 1947 (61 Stat. 459; Title 15 U. S. C. § 717f (h))**

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (1946)]

SEC. 2. When used in this act, unless the context otherwise requires—

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regu-

lations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company

making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

* * *

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas Company on file with the Commission, unless

such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. 717f (a) (1946)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. 717f (b) (1946)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the re-

quirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c) (1946)].

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (d) (1946)]

* * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of

the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sertion 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. 717r (1946)]

* * *

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any rule, regulation, or order of the Commission thereunder. [52 Stat. 832 (1938); 15 U. S. C. § 717 (s)]

SEC. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, by punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [52 Stat. 833 (1938); 15 U. S. C. 717t]

## APPENDIX E

### Order No. 174-A (Superseding Order No. 174)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER and SEABORN L. DIGBY.

In the Matter of
Compliance by Natural-Gas Producers and Gatherers With Certificate and Rate Requirements

Docket No. R-138

ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

By Order No. 174 issued July 16, 1954 (19 F.R. 4534) the Commission amended Part 154—Rate Schedules and Tariffs, and Part 157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company* v. *Wisconsin et al.*, 347 U. S. 672.

Upon further consideration of the matter, the Commission *finds:*

(1) Sections 157.23, 157.24 and 157.25 of the Regulations under the Natural Gas Act prescribed by

Order No. 174 should be revised, as hereinafter provided, so as to allow those proposing to engage in the transportation or sale of natural gas in interstate commerce as independent producers to use one of the simpler forms of application therein provided and to clarify some of the requirements of those forms, and to clarify Section 154.94. Section 154.102, *Posting,* should be eliminated and Section 154.103, *Applicability,* should be re-numbered as Section 154.102.

(2) The other sections in Parts 154 and 157 of the Regulations under the Natural Gas Act prescribed by Order No. 174 which are not being revised or eliminated should be readopted and as so readopted, together with the revised Sections 157.23, 157.24 and 157.25, are necessary and appropriate to carry out the provisions of the Natural Gas Act.

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 7 and 16 thereof (52 Stat. 822, 824, 830; 15 U. S. C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U. S. C. 1002, 1003), *orders:*

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.*—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural

gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies".*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of pur-

chaser, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.93 *Rate Schedule Defined.*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules.* — No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with

the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty daays after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered

for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each part to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.95 *Oral Agreements.*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission.

§ 154.96 *Filing Date.*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

§ 154.97 *Cancellation or Termination.*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of

cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements.*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 *Number of Copies.*—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25 ,D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing.*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101 *Acceptance for Filing Not Approval.*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation

or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Applicability of Sections 154.91 through 154.101.*—Sections 154.91 through 154.101 hereof shall be applicable, only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections as follows:

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer.*—(a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by October 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 14 copies) pursuant to Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. In those instances where a certificate of public convenience and necessity is required of a natural-gas company for the construction or operation of facilities to enable it to take natural gas from another natural-gas company, the applications for certificates of public convenience and necessity shall be filed simultaneously.

§ 157.24 *Contents of Application.*—(a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor

in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Notice of the application shall be given by applicant by service of a true copy of the application (without the exhibits provided for in § 157.25) upon the State Regulatory commission, agency, or official having authority to regulate the transportation or sale of gas in every State in which applicant operated on June 7, 1954 or proposes to operate, or upon the Governor of the State when there is no such State regulatory commission, agency, or official, by delivery of said copy in person or by registered mail.

§ 157.25 *Necessary Exhibits.*—There shall be filed with the application as a part thereof the following exhibits. Any information required which is already on file with the Commission may be incorporated by reference. If the application covers operations on June 7, 1954, and the applicant is unable to file any designated exhibit on or before October 1, 1954, a statement setting forth the reasons for such failure should be submitted in lieu of the appropriate lettered exhibit and a further extension of time for filing the exhibit, not to exceed 90 days, may be granted. The following

required exhibits are designed to amplify paragraphs (a) and (b) of § 157.24.

*Exhibit A.* If applicant represents a group of individuals, satisfactory proof of his authority to file the application.

*Exhibit B.* A general key map of applicant's facilities for the production, transportation, or sale of natural gas showing:

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a)(4)(iv).

The map need be only of sufficient scale and in sufficient detail to show the geographical location of the properties.

*Exhibit C.* The applicant may submit as many additional exhibits as may be deemed essential for consideration of the application.

§ 157.26 *Form of Filing.*—An application under § 157.24 and § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other Information.*—The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service.*—No independent producer as defined in Section 154.91 of these Rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained in accordance with Section 7(b) of the Natural Gas Act.

§ 157.29 *Applicability of Sections 157.23 to 157.28.*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174 issued July 16, 1954 is hereby rescinded and superseded by this Order.

(F) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner DIGBY dissenting.

/s/ Leon M. Fuquay
LEON M. FUQUAY,
*Secretary.*

Adopted: July 30, 1954.
Issued: August 6, 1954.

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In the Matter of
Compliance by Natural-Gas Producers and Gatherers With Certificate and Rate Requirements

Docket No. R-138

DIGBY, Commissioner, *dissenting:*

I find it necessary to restate my dissent from the conclusions by the majority of the Commission in connection with this Order since Order No. 174, carrying my dissent, is completely repealed by this Order. I do, however, approve of the changes which this Order makes from the provisions of Order No. 174.

In approaching our responsibilities in connection with the added jurisdiction of the Federal Power Commission over producers and gatherers of gas as outlined in the recent Supreme Court decision, it should be realized that we are dealing with the seventh largest industry in this country and that millions of consumers may be directly affected by our approach to this matter.

It is my opinion that the majority of the Commission has exceeded its rule-making authority in adopting this *ex parte*

and unilateral order. The effect of this order will not only fix rates retroactively to June 7, 1954, but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954. Any retroactive date is arbitrary. There would be as much sanction in law for making these regulations retroactive to the effective date of the Natural Gas Act in 1938 as any other retrocative date. This, in my opinion, is in violation of the express provisions of the Natural Gas Act which prohibits the fixing of rates retroactively. I also feel that the Order may have the effect of depriving the producers of the provisions of Section 4 of the Natural Gas Act. Under Section 4 of the Natural Gas Act, a natural-gas company may file an increased rate with the Commission, which rate can be suspended by the Commission for a period not to exceed five months after which time the company may collect the increased rate under bond awaiting a final determination by the Commission. In freezing the producer's rate as of June 7, 1954, they are deprived of any opportunity to file as an original rate schedule a sales contract in which the price of gas has increased since June 7, 1954. Further, original tariffs or rates cannot be suspended by the Commission and the company is entitled under the law to collect the filed rate at least until after an investigation by the Commission with a final determination concerning the rate. In these particulars, at least, it is my opinion that the Order adopted by the majority of the Commission may deprive independent producers, as defined in that Order, of their right of due process of law. The Order adopted by the majority of the Commission requires all independent producers who were selling gas into interstate commerce on June 7, 1954, to file with the Commission their sales contracts as of June 7, 1954. The Order further requires all of these producers to make application to the Commission for certificates of public convenience and necessity authorizing each and every

separate sale in interstate commerce. It has been repeatedly stated that there are 2,300 such independent producers. Most of these producers who are selling gas in interstate commerce will have an average of three separate sales which would require a minimum of 6,000 applications for certificates of public convenience and necessity to be filed with the Federal Power Commission not later than October 1, 1954, and this in addition to the filing of all sales contracts under the rate provisions of the Order. From the records on file with this Commission, it appears that about 80% of all the gas being sold in interstate commerce is sold by approximately 61 companies and that the remaining 20% is sold by over 2,000 small producers in twenty States. It seems to me that a more prudent approach to our regulatory responsibility would call for the institution of separate proceedings in connection with the 61 companies selling 80% of the natural gas with the right afforded to these companies of a public hearing under an order dealing with the rights of the parties in a prospective manner and not imposing regulations retroactively. By requiring the immediate filing of rate schedules and applications for certificates of public convenience and necessity authorizing each sale, I fear the Commission will be unable to see the forest for the trees. I do not suggest that the smaller producers be excused from regulation but I certainly would insist that the rules of the Commission be greatly simplified insofar as they are concerned and that ample time be given to these small producers to orderly comply with the Commission's regulations. I would give serious consideration to a grandfather clause qualification for these producers. I personally know that very few, if any, of the independent producers will have any understanding of their duties after reading the Order by the majority of the Commission. I also know it will be almost impossible for them to secure the services of attorneys who are in a position to tell them what to do without first making a thorough study and re-

search concerning the Commission's rules and regulations which are very voluminous and greatly in need of revision and compiling.

Under the majority opinion, no producer's price can be increased after June 7, 1954, without a proceeding before the Commission. Our records here disclose that some transmission companies are purchasing gas from producers under firm contracts which contain provisions of one kind or another for the increase in the price of gas which has become effective or will become effective after June 7, 1954, and before any opportunity can be afforded for the Commission to consider a producer's application to increase his rate to the transmission company. For instance, the Texas State Producing Tax becomes effective, according to my information, on September 1, 1954. Most purchase contracts of transmission companies provide for the payment by the purchaser of all or a part of this additional tax. Under the Order, the transmission company will be faced with the problem of paying the additional price and running the risk of never recovering it or refusing to pay it and run the risk of having its gas cut off for the non-payment of the purchase price. Of course, if this should be done, the transmission company would be faced with lawsuits by distributors to whom they are selling under firm contracts. All of these conditions could be properly taken care of by an order approving all existing firm sales contracts made in good faith and at arm's-length up to and including a future date of, say ,October 15, 1954. This would give an opportunity to have both the producer and the transmission company before the Commission on the matter of price regulation concurrently and would eliminate many hardships and problems which, in my opinion, are unnecessary. This policy would simply be to continue for the purpose of securing good regulation the same policy which has existed since the adoption of the Natural Gas Act in 1938 and certainly an additional 60 or 90 days under

the same rules and regulations which have prevailed in the past would be a small price to pay for an opportunity to approach this greatly enlarged regulation with thought and consideration.

Section 157.23(a) of the Order makes mandatory upon all producers who were selling gas in interstate commerce on June 7, 1954, the obligation to apply to the Federal Power Commission for a certificate of public convenience and necessity to authorize such sale. In this connection, I would like to call attention to the fact that the Natural Gas Act, when passed by Congress, provided for a period within which any natural-gas company, as defined by the Act, could withdraw from its activities, or, in the absence of such withdrawal, should apply for a certificate of public convenience and necessity. Also, Rule 1.7(c) of the Commission's regulations provide for a declaratory proceeding for the determination of the question of jurisdiction. This Order not only refuses an opportunity to the producers to withdraw from any transaction which makes him a natural-gas company but makes the Order retroactive to June 7, 1954, and, in my opinion, is in violation of the purpose and intention of Congress in adopting the Natural Gas Act. I further feel that Section 7(b) of the Natural Gas Act, dealing with abandonment, may be subject to the interpretation that the abandonment which cannot be made without first obtaining a certificate therefor is the abandonment of facilities which have been certificated or the abandonment of services through *such* facilities. It is certainly indisputable that the provisions of this section of the Natural Gas Act and its treatment in Section 157.24 of the Order adopted by the majority of the Commission is subject to great doubt and deserves a determination after the interested parties have been given a chance to be heard. Section 157.24 of the Commission's Order makes a determination of this legal issue retroactively and without giving an opportunity to the interested parties to be heard on the

subject. There is a strong possibility that this Order violates the due process clause of the Fifth Amendment of the Constitution, as well as the contract clause of Section 10, Article 1, of the Constitution.

It is my considered opinion that the majority of the Commission has permitted good intentions and plausible purposes with reference to immediate and positive action to lead them into error.

S. L. DIGBY,
*Comissioner.*

Filed: July 30, 1954.
Issued: August 6, 1954

## APPENDIX F

### Order No. 174-B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH, SEABORN L. DIGBY and FREDERICK STUECK.

In the Matters of
Compliance by Natural-Gas Producers and Gatherers With Certificate and Rate Requirements

and

Consideration of the Desirability of Rules Concerning Automatic Escalation and Favored Nation Clauses in Contracts by Interstate Natural-Gas Companies With Producing Companies

Docket No. R-138
Docket No. R-137

ORDER AMENDING ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, WAIVING ACCOUNTING REQUIREMENTS, AND RELATING TO AUTOMATIC ESCALATION AND FAVORED NATION CLAUSES IN CONTRACTS FOR THE SALE OF NATURAL GAS BY SUCH PRODUCERS AND GATHERERS

*Docket No. R-138*

1. By Order No. 174-A (superseding Order No. 174) issued August 6, 1954 (19 F.R. 5081), the Commission amended Part 154—Rate Schedules and Tariffs, and Part

157—Applications for Certificates of Public Convenience and Necessity, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18, Code of Federal Regulations, by prescribing regulations governing the filing of rate schedules and applications for certificates of public convenience and necessity by persons engaged in the production and gathering of natural gas and held by the Supreme Court to be subject to all the requirements of the Natural Gas Act in *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U. S. 672.

2. Numerous petitions for rehearing were filed and rehearing of Order No. 174-A was granted by order issued September 8, 1954 (19 F.R. 5952) for the purpose of receiving briefs and arguments in order that the Commission might determine whether to revoke, rescind or modify that order in any respect. Briefs and comments were filed and oral argument thereon was had on September 22 and 23, 1954. As a consequence, Order No. 174-A was modified by order issued September 24, 1954 (19 F.R. 6301) by which the filing dates prescribed in that order for some purposes were extended from October 1 to December 1, 1954. At the same time a clarifying change was made in the third paragraph of Section 154.94.

3. Upon consideration of the briefs and arguments made herein together with the experience gained in its operations to date under the existing provisions of Order No. 174-A, the Commission is of the opinion that it is necessary and desirable in the public interest and for its own convenience that those portions of its General Rules and Regulations embodied in Order No. 174-A be further amended to read as set out below.

4. Many of the petitions for rehearing, although objecting to the lack of notice when the rules were originally adopted, recommended changes which would be of a distinctively substantive nature. Substantive rules, however, do not appear desirable in connection with the filings with

which these rules are concerned and it is the intention of the Commission to relate these rules strictly to procedural matters. A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the Act by the decision of the United States Supreme Court in *Phillips Petroleum Company* v. *Wisconsin, et al.*, 347 U.S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

5. Some of the petitions urged that the regulations be amended to relieve small producers from the requirements of the statute. The Act does not provide for exemptions from its requirements, but the regulations for producers are herein revised in Sections 154.91, 154.92, 154.94 and 157.23 to further simplify the filings by small producers.

6. It was also urged that the Commission limit the applicability of the Act to those operators selling gas in interstate commerce after processing or gathering and acting for other working interests. The rules are here revised by the addition of a paragraph in Section 154.91 under which operators may file in those situations where the purposes of the statute as to certificate requirements and rate fixing may be made fully effective, without calling for separate filings by those having working interests, although such interests may also file if they care to do so. It is expected that by this paragraph a large number of parties

having working interests may be relieved of the filing requirements, although, of course, they are not and cannot be exempted from the statute, if, by reason of their activities, they come within its terms.

7. The map required in Section 157.25 as an exhibit in support of a certificate application is not intended to be a topographic survey map but a general sketch. A further exhibit is also required as set forth in paragraph 10 below.

8. The statement in the rules with respect to the abandonment of service has been misconstrued and for that reason is being revised to quote Section 7(b) of the Act. A proviso is added, however, that nothing in the rules shall be construed as interfering with or intended to interfere with or prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production of natural gas.

9. There has been some confusion as to the notices or copies to be furnished to State Commissions and the references thereto in the rules are eliminated. Other minor revisions of a technical or clarifying nature are also made in some of the sections below.

*Docket No. R-137*

10. In Docket No. R-137 the Commission has under consideration the desirability of adopting rules within the terms of the Natural Gas Act either in connection with the issuance of certificates of public convenience and necessity whereby contracts between producers and interstate pipeline companies containing automatic escalation and favored nation clauses would be declared not to be admissible as evidence of gas supply, or in connection with rate-making whereby increased payments made under escalation provisions but having no relation to additional or improved service or gas supplies to an interstate transporter could be disallowed, or in some other connection whereby effective

action can be taken in the premises pursuant to the terms of the Act.

11. General public notice of proposed rule-making in Docket No. R-137 was given by publication in the Federal Register on May 13, 1954 (19 F.R. 2768) and mailing notices to interested parties, including State and Federal regulatory agencies. This notice invited data, views, comments, and suggestions concerning the contract provisions mentioned and set oral arguments thereon for September 9, 1954. By notice similarly published on July 22, 1954 (FR 4543) the date for oral argument was continued to November 4, and the argument was heard on November 4 and 5, 1954.

12. Views, comments and suggestions were filed by numerous persons, including the representatives of State regulatory agencies, companies engaged in local distribution of natural gas, interstate pipe-line companies, and independent producers and gatherers. Representatives of all of these diverse interests took part in the oral argument.

13. As a result of the representations submitted both orally and in writing in Docket No. R-137 and in view of the desirability of clarifying the showing to be made in this connection by natural-gas companies seeking certificates of public convenience and necessity, the contracts of sale are hereinafter required as an exhibit in support of an application under Section 157.24 and 157.25 for a certificate of public convenience and necessity. Escalation clauses of the type referred to in Section 157.25, *Exhibit B,* below, in the sales contracts of independent producers so submitted should not be considered in support of any application nor given effect by the Commission.

Upon further consideration of the matter, the Commission *finds:*

(1) Sections 154.91, 154.92, 154.94, 154.95, 154.97, 154.98, 157.23, 157.24, 157.25 and 157.28 of the Regu-

lations under the Natural Gas Act prescribed by Order No. 174-A, as amended by the order issued September 24, 1954 herein, should be further revised for the reasons and in the manner set forth above.

(2) Adoption and promulgation of the proposed revisions are necessary and appropriate to carry out the provisions of the Natural Gas Act.

(3) For convenience, it is appropriate that those sections of Order No. 174-A which are not revised hereby be published together with the revised sections referred to above and that the order as so revised be designated as Order No. 174-B.

(4) The points and issues raised by the petitions for rehearing which are not covered by the revisions hereinafter made should be denied.

(5) From the circumstances referred to in the recitals above set forth, it appears that good cause exists for immediate issuance of the following regulations and it is unnecessary in the public interest that notice or further public proceedings be had prior to the adoption of such revised Regulations.

(6) Upon full consideration of the representations made in Docket No. R-137; escalation clauses of the types referred to in Section 157.25, Exhibit B, below are not in the public interest and such clauses will not be considered as evidence in support of any application for a certificate of public convenience and necessity or for other purposes nor given effect by the Commission.

(7) Further proceedings in Docket No. R-137 are not necessary.

The Commission, acting pursuant to the authority granted by the National Gas Act, particularly Sections 4, 7 and 16

thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), *orders:*

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 *Applicability.*—(a) An "independent producer" as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

(b) The filings with regard to all sales required under § 154.92, § 154.94 and § 157.23 may be made by (1) an operator of one or more wells under coownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an operator under this paragraph, the parties to the operating arrangement, and those producers who sell to the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operat-

ing arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any changes in the several respects since the list was previously submitted.

§ 154.92 *Filing of Rate Schedules by Independent Producer.*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient

detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf. annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county, and State) at which delivery is made.

§ 154.93 *Rate Schedule Defined.*—For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules.*—(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section

154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this Section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary, to suspend such proposed change. If any such proposed change

is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in the rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the foregoing paragraphs in this Section, file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

§ 154.95 *Oral Agreements.*—If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in duplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in duplicate, their understanding of the agreement.

§ 154.96 *Filing Date.*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.92 through 154.99 of these Regulations.

§ 154.97 *Cancellation or Termination.*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements.*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission

upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 90 days before the effective date.

§ 154.99 *Number of Copies.*—Two copies of any rate schedule or part thereof, and material required by Section 154.95 to be filed therewith, and Notices of Cancellation or Termination submitted for filing, must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single package, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, propery designated so that each item is easiy identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing.*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.92 through 154.99.

§ 154.101 *Acceptance for Filing Not Approval.*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Applicability of Sections 154.92 through 154.101.*—Sections 154.92 through 154.101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the

Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 *Applications for Certificates of Public Convenience and Necessity by Independent Producer.*—(a) Every independent producer of natural gas as that term is defined in Section 154.91 who, on or after June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before December 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by December 1, 1954 an application (original and five copies) containing the information called for by the attached Exhibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transporta-

tion or sale upon application (original and 14 copies) pursuant to Section 157.24 through 157.27. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by the attached Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the Commission to consider all related matters concurrently.

(c) Filings hereunder may be made by an operator as provided in § 154.91 hereof.

§ 157.24 *Contents of Applications.*—(a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the location of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the persons to whom correspondence or communi-

cations in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required, upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year,

shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

§ 157.25 *Necessary Exhibits.*—There shall be filed with the application as a part thereof the following exhibits:

*Exhibit A. Map.* Each applicant under Section 157.24 shall file as part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A. The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe lines and the diameters thereof.

(c) The points of connection with the facilities or pipe-line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a)(4)(iv).

*Exhibit B. Contracts.* Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); and provided further, That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. Escalation clauses in contracts submitted hereunder on or after May 1, 1955 will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

§ 157.26 *Form of Filing.*—An application under § 157.24 or § 157.25 shall be in compliance with § 1.15 and § 1.17 of this chapter, and in addition the original of the application (which shall include

the originals of all exhibits accompanying said application) shall be verified under oath by a person having knowledge of the matters therein set forth.

§ 157.27 *Other Information.*—The applicant may be required to furnish such additional information as the Commission may deem pertinent.

§ 157.28 *Abandonment of Service.*—No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

§ 157.29 *Applicability of Sections 157.23 to 157.28.*—Sections 157.23 through 157.28 hereof shall be applicable only to an independent producer as defined in Section 154.91 of these Rules.

(C) The amendments of rules and regulations herein prescribed are hereby made effective immediately upon issuance hereof.

(D) Until the further order of the Commission, the rules and regulations requiring natural-gas companies to keep and maintain their accounts in ac-

cordance with the Commission's Uniform System of Accounts for Natural Gas Companies (18 CFR Chapter I, Subchapter F) and to submit reports thereon shall not apply to independent producers as defined in Section 154.91.

(E) Order No. 174-A issued August 6, 1954 is hereby revised and as revised herein shall be designated as Order No. 174-B.

(F) The petitions for rehearing filed herein are denied with respect to all other points and issues raised in such petitions.

(G) The proceeding in Docket No. R-137 are hereby terminated.

(H) The Secretary of the Commission shall cause publication of this Order to be made in the Federal Register.

By the Commission. Commissioner DIGBY dissenting.
(SEAL)

/s/ Leon M. Fuquay
LEON M. FUQUAY,
*Secretary.*

Adopted: December 16, 1954.
Issued: December 17, 1954.

| In the Matters of | |
|---|---|
| Compliance by natural-gas producers and gatherers with certificate and rate requirements | Docket No. R-138 |
| and | |
| Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies | Docket No. R-137 |

SMITH and STUECK, Commissioners, *concurring:*

While concurring—under the circumstances here present—in the action of the Commission, we find ourselves in agreement with so much of what is said in the dissenting opinion that it seems appropriate to state with some particularity our position regarding the two major points covered therein.

We share fully the view that it would be highly desirable, if it were now possible, for the Commission to resolve prevailing uncertainties concerning the sweep of its jurisdiction under the *Phillips* decision, both to provide proper guidance to the industry affected and to minimize its own administrative burdens and dilemmas.

Depending upon whether prime emphasis is attached to the precise facts presented in the case of Phillips or to the broad language used in the *dictum* of the Supreme Court's opinion, arguments can be made for either of the extremes of possible interpretations of that decision: that our jurisdiction is limited to the sale of natural gas at the tailgate of the processing plant, or the point where the natural gas enters the interstate pipe line, or in the alternative, that our jurisdiction extends to every wellhead sale in the field, or to the point of the first sale of natural gas for resale, wherever that may be, if interstate

commerce turns out ultimately to be involved. Both interpretations have their advocates; both have been urged upon us.

Perhaps the correct answer lies in some as yet undetermined middle ground which would be conducive both to the reasonable and necessary flexibility and the continued good health of a vital industry and to the avoidance of a bogging down under its own weight of the whole regulatory process in the natural-gas field. It seems to us that it is the clear duty and responsibility of this Commission to take the initiative in seeking such a solution. So long as present uncertainties exist and unresolved questions accumulate, a situation which has been described as one of "administrative chaos" seems likely to exist.

Whether, however, we can now properly and wisely determine the precise boundaries of our jurisdiction in the areas of production and gathering is another matter. The question appears to have its substantive aspects, which might require further and more specific notice than that provided in this proceeding,—notwithstanding the fact that some of those who argued on rehearing went rather fully into this phase of the matter. Apart from that, certain of these issues are sharply posed in several proceedings now in hearing before us which, it is to be hoped, may well add to our understanding of the practical aspects and ramifications of these complex matters. It is for these reasons that we join in the Commission's deferral of a more direct and satisfactory answer—through administrative definitions and rules of general application, which we think should be promulgated when it is feasible to do so—to this very important question at the present time.

Similarly, we are impressed by the strong arguments which have been made for the proposition that existing contracts under which sales of natural gas were being made by producers and gatherers to interstate pipe lines on June 7, 1954, and which the Commission's Order

No. 174-A, as modified on September 24, 1954, has required to be filed by December 1, 1954, are to be regarded as complete entities, so that all of their terms—and not just certain selected segments—should be treated as initial rates. Failure to so treat them in effect, it seems to us, in many instances—particularly where stated price adjustments, upward or downward, are provided for on a definite and strictly adhered to periodic basis—might involve grave injustice and disregard some very elementary, obvious and important economic facts of life.

This, however, is not to say that we are compelled, as a matter of law, to so regard these filings, and therefore, to disclaim all authority to suspend and, after notice, to examine into the reasonableness, from every point of view, of changes in the charges provided for under such contracts before they may become fully effective. It does seem to us that such provisions contained in pre-existing arm's-length contracts are entitled to great weight and, as initial filings, may fairly be considered as *prima facie* reasonable. Indeed, many, if not most, of them have been fully disclosed to all interested parties and relied upon in certificate proceedings where new pipe-line projects or extensions or enlargements of existing systems have been approved after being strongly supported by all concerned.

These are factors which, in our judgment, should be taken into account by the Commission and may well be controlling when, in the exercise of its administrative discretion under Section 4 (e) of the Natural Gas Act, it is considering whether or not to suspend rate changes. But we are not now persuaded that in all such situations the Commission is, as a matter of law, confined to investigations pursuant to Section 5 of the Act,—which avenue of approach is, of course, always open to us in any situation wherein the reasonableness of rates subject to our jurisdiction is at issue.

Here again, however, it seems to us probable that the Commission will gain further information and knowledge regarding the impacts and significance of this facet of the problem during the course of the proceedings in Docket No. R-142, which are now scheduled to open on January 11, 1955. Therefore we deem it wise to defer action on this aspect of the matter for the present.

As indicated above, it is our understanding that, as to both of the points so ably developed in the dissenting opinion, the Commission is by its action at this time in no manner or degree foreclosing further consideration, and in no way precluding the future disposition, of these issues through the promulgation of interpretative rules of general application in appropriate proceedings, should the feasibility of such a course subsequently appear to be greater than it now does. On the contrary, the earlier supersession of Order No. 174 by Order No. 174-A, and the latter's amendment by the instant Order No. 174-B demonstrate, we believe, the Commission's willingness to follow a properly pragmatic approach to the problems entailed in its newly defined jurisdiction in the areas of production and gathering. We confidently expect, therefore, that further clarifications and refinements of a practical nature will be possible as we gain additional experience and understanding in these new fields of regulation.

NELSON LEE SMITH, Commissioner

FREDERICK STUECK, Commissioner

Filed: December 16, 1954

Issued: December 17, 1954

| In the Matters of | |
|---|---|
| Compliance by natural-gas producers and gatherers with certificate and rate requirements | Docket No. R-138 |
| and | |
| Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies | Docket No. R-137 |

DIGBY, Commissioner, *dissenting:*

Without restating my dissent from Order No. 174-A, I wish to adopt it by reference.

Agreeable to information submitted and experience gained since the issuance of Order No. 174-A I dissent from this amendment of that order.

*First:* I believe that it is the Commission's responsibility and duty to define its jurisdiction over independent producers and gatherers of natural gas. Without such a decision by the Commission, hundreds of independent producers will file applications for certificates of public convenience and necessity, together with rate filings, in transactions entirely outside of the jurisdiction of the Federal Power Commission. By a positive determination at this time by the Commission, orderly regulation would be greatly advanced both with reference to certificate proceedings and rate filings and proceedings. In this connection, I would have the Commission give a broad but limiting definition of sales of natural gas by independent producers, gatherers, and processors of natural gas subject to regulation under the Natural Gas Act. The only provision in the Natural Gas Act as interpreted by the court decisions thereon concerning jurisdiction over producers and gatherers of gas is a reference to a "sale in interstate commerce of natural gas for resale." When the sale is made to a person who gathers gas and processes it

in the state where it is produced and then the residue is sold in interstate commerce for resale, the first transaction, in my opinion, is purely a local one and not a sale in interstate commerce of natural gas for resale. This conclusion is certainly supported by the provisions of the Natural Gas Act. Section 1(b), applies "to the sale in interstate commerce . . . for resale" but "shall not apply to any other . . . sale." The Act does not, and the court opinions do not, imply that it applies to the sale for resale in interstate commerce but only "to the sale in interstate commerce for resale." It is my opinion that this order should define a jurisdictional sale of natural gas under the Natural Gas Act as a *direct* sale of natural gas in interstate commerce for resale, which sale of natural gas shall include all natural gas dedicated by contract for sale in interstate commerce for resale. In agreement with the language of the Act, I would prescribe that no other sales of natural gas are subject to the jurisdiction of the Federal Power Commission. In the Supreme Court decision in the *Phillips* case, the Court stated that Phillips admitted that it engaged in "the sale in interstate commerce . . . for resale." Therefore, the question of the sale in interstate commerce for resale was not an issue. The Court went to great lengths in detailing the facts concerning the wholesale sale by Phillips at the tailgate of its processing plant after production, gathering, and processing of the gas. It has been argued with much force that a well-head sale of natural gas, even though it be a *direct* sale in interstate commerce for resale, is not subject to regulation for the reason it is neither a wholesale sale nor a sale in interstate commerce for resale after production and gathering have intervened. At the outset, in discussing this point, I expressed a view in favor of a broad but limiting definition of sales subject to regulation. I consider the definition which I have used to be broad and perhaps inclusive of some sales such as well-head sales which may be determined by the courts to be non-jurisdictional.

*Second:* It is my opinion that all fixed escalations or different prices of gas denominated in mills or cents contained in good faith arm's-length contracts in existence on the effective date of Order No. 174-A should be accepted as a part of the original rate and constituting one tariff or rate schedule not subject to suspension under Section 4 of the Natural Gas Act. These contracts were entered into at a time when the contracting parties had no thought of regulation of the price under the authority of the Natural Gas Act. Most of the contracts were entered into for long terms and supported by a dedication of gas reserves in compliance with requirements of the Federal Power Commission in certificate proceedings by transmission companies. Order No. 174-A requires that all of these contracts be filed as rate schedules. Under the provisions of the Natural Gas Act and in rate regulation in general the filer of an original rate schedule has a legal right to file an original rate of his own choosing, subject of course to investigation upon complaint by an interested party or at the instance of the Federal Power Commission but not subject to suspension under Section 4 of the Natural Gas Act. The financial feasibility of transmission lines and distribution systems were predicated upon the over-all price conditions contained in these contracts. Securities issued and sold upon this understanding of the transaction are held by thousands of people who will be directly affected by our treatment of this subject. Accepting these original rate schedules including periodic changes in the price of gas would not be an approval of the rate as fair and reasonable but would simply treat the changes as component parts of an original rate schedule not subject to suspension.

SEABORN L. DIGBY, Commissioner

Filed: December 16, 1954

Issued: December 17, 1954

## APPENDIX G

**Findings and Order Issuing Certificates of Public Convenience and Necessity.**

Docketed Oct. 28, 1954.

UNITED STATES OF AMERICA.
FEDERAL POWER COMMISSION.

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matters of:

CITIES PRODUCTION CORPORATION—Docket No. G-2721,
TEXAS GULF PRODUCING COMPANY and THE AMERICAN OIL COMPANY—Docket No. G-2793,
FOREST OIL CORPORATION—Docket No. G-2798,
TIDE WATER ASSOCIATED OIL COMPANY—Docket No. G-2801,
TIDE WATER ASSOCIATED OIL COMPANY—Docket No. G-2802,
TIDE WATER ASSOCIATED OIL COMPANY, ET AL.—Docket No. G-2803,
FOREST OIL CORPORATION, ET AL.—Docket No. G-2804,
NATURAL GAS DISTRIBUTING CORPORATION—Docket No. G-2945,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3106,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3108,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3109,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3110,
THE MID-GULF EXPLORATION COMPANY—Docket No. G-3148,
PAN AMERICAN PRODUCTION COMPANY—Docket No. G-3209,
PAN AMERICAN PRODUCTION COMPANY—Docket No. G-3216,
E. G. BATEMAN, d.b.a. BATEMAN DRILLING COMPANY—Docket No. G-3298,
THE TEXAS COMPANY—Docket No. G-3643,
THE TEXAS COMPANY, ET AL.—Docket No. G-3644,
THE TEXAS COMPANY—Docket No. G-3645,

THE TEXAS COMPANY, ET AL.—Docket No. G-3646,
—100-2 Formal,
THE TEXAS COMPANY—Docket No. G-3647,
THE ATLANTIC REFINING COMPANY—Docket No. G-3765.

The Applicants designated in Tabulation A below have filed, as independent producers of natural gas, their applications for certificates of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, authorizing the sale of natural gas produced from the indicated fields to United Fuel Gas Company (United Fuel). All sales are to be made in accordance with the respective contractual obligations. Deliveries of the gas are to be made to Gulf Interstate Gas Company's (Gulf Interstate) existing line (Docket No. G-2058) for transportation by Gulf Interstate for the account of United Fuel. The proposed sales are to be made at the respective points of interconnection of Applicants' facilities with those of Gulf Interstate.

TABULATION "A"

| Docket No. | Applicant—Address | Date Filed | Location of Field |
|---|---|---|---|
| G-2721 | Cities Production Corp., a Delaware corporation, Bartlesville, Okla. | 9-10-54 | Bourg field, Terrebonne and Lafourche Parishes, La. |
| G-2793 | Texas Gulf Producing Co., a Delaware corporation, Houston, Texas, and American Oil Co., a Maryland corporation, New York, N. Y. (as supplemented 10-25-54) | 9-16-54 | Lake Long field, Lafourche Parish, La. |
| G-2798 | Forest Oil Corporation, a New York corporation, Bradford, Pa. | 9-17-54 | Bourg and North Bourg fields, Lafourche Parish, La. |
| G-2801 | Tide Water Associated Oil Co., a Delaware corporation, San Francisco, Calif. | 9-17-54 | Erath field, Vermilion Parish, La. |
| G-2802 | Tide Water Associated Oil Co., a Delaware corporation, San Francisco, Calif. | 9-17-54 | North Bourg field, Lafourche Parish, La. |
| G-2803 | Tide Water Associated Oil Co., a Delaware corporation, and others as listed in the application, San Francisco, Calif. | 9-17-54 | Florence field, Vermilion Parish, La. |

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| G-2804 | Forest Oil Corporation, a New York corporation, Bradford, Pa., Acadia Investments, Inc., a Delaware corporation, and certain individuals as listed in application, Dover, Del. | 9-17-54 | Ellis field, Acadia Parish, La. |
| G-2945 | Natural Gas Distributing Corp., a Texas corporation, Tyler, Texas | 9-22-54 | Killens Ferry and Lamar fields, Tensas and Franklin Parishes, La. |
| G-3106 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Avery Island field, Iberia Parish, La. |
| G-3108 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Cameron Meadows field, Cameron Parish, La. |
| G-3109 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Erath field, Vermilion Parish, La. |
| G-3110 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Ellis field, Acadia Parish, La. |
| G-3148 | Mid-Gulf Exploration Co., a Maryland corporation, Houston, Texas | 9-27-54 | Valentine field, Lafourche Parish, La. |

| Docket No. | Applicant—Address | Date Filed | Location of Field |
|---|---|---|---|
| G-3209 | Pan American Production Co., a Delaware corporation, Houston, Texas | 9-27-54 | Church Point and Northwest Branch Areas, Acadia Parish, La. |
| G-3216 | Pan American Production Co., a Delaware corporation, Houston, Texas | 9-27-54 | South Pecan Lake and Little Pecan Lake fields, Cameron Parish, La., and Lake Sand field, St. Mary and Iberia Parishes, La. |
| G-3298 | E. G. Bateman, d.b.a. Bateman Drilling Co., an individual, filing for himself and others, New Orleans, La. | 9-27-54 | Ellis field, Acadia Parish, La. |
| G-3643 | The Texas Company, a Delaware corporation, Houston, Texas | 9-29-54 | East Mud Lake field, Cameron Parish, La. |
| G-3644 | The Texas Company, a Delaware corporation, for itself and others, as listed in the application, Houston, Texas | 9-29-54 | Valentine field, Lafourche Parish, La. |
| G-3645 | The Texas Company, a Delaware corporation, Houston, Texas | 9-29-54 | Bayou Sale and Horseshoe Bayou fields, St. Mary Parish, La. |



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| G-3646 | The Texas Company, a Delaware corporation, for itself and others, as listed in the application, Houston, Texas | 9-29-54 | Erath field, Vermilion Parish, La. |
| G-3647 | The Texas Company, a Delaware corporation, Houston, Texas | 9-29-54 | Various field in Terrebonne, Lafourche, St. Charles, and Jefferson Parishes, La. |
| G-3765 | The Atlantic Refining Co., a Pennsylvania corporation, Dallas, Texas | 9-30-54 | Midland - Estherwood field, Acadia Parish, La. |

The applicants designated in Tabulation B below are presently selling gas from the above respectively indicated fields under interim contracts with the hereinafter indicated purchasers. These applicants seek, in addition to the hereinbefore stated authorization, limited certificates of public convenience and necessity authorizing the designated interim sales until November 1, 1954, or until United Fuel is prepared to take the gas.

TABULATION "B"

| Docket No. | Applicant | Interim Purchaser |
|---|---|---|
| G-2721 | Cities Production Corp. | United Gas Pipe Line Company |
| G-2798 | Forest Oil Corp. | United Gas Pipe Line Company |
| G-2804 | Forest Oil Corp., et al. | Transcontinental Gas Pipe Line Corp. |
| G-3106 | Humble Oil and Refining Co. | United Gas Pipe Line Company |
| G-3108 | Humble Oil and Refining Co. | Magnolia Petroleum Company |
| G-3209 | Pan American Production Co. | Texas Northern Gas Corp. and United Gas Pipe Line Co., under Operators' agreement |
| G-3298 | E. G. Bateman | Transcontinental Gas Pipe Line Corp. |
| G-3765 | Atlantic Refining Co. | Tennessee Gas Transmission Co. |

Pursuant to due notice, a public hearing was held in Washington, D.C., on October 26 and 28, 1954, respecting the matters involved in and the issues presented by the applications. The single petition to intervene filed in Docket No. G-2793 having been withdrawn prior to Commission action thereon, no protest to any of the applications is on file.

The Commission finds:

(1) The proposed sales of natural gas hereinbefore described in Tabulation "A", as more fully described in the applications, will be sales of natural gas in interstate commerce, subject to the jurisdiction of the Commission, and such sales by Applicants, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, and each Applicant, upon the commencement of the operations hereinbefore described, as more fully described in the applications listed in Tabulation A, will, therefore, be a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas hereinbefore described in Tabulation B, as more fully described in the applications, are sales of natural gas in interstate commerce, subject to the jurisdiction of the Commission, and such sales by Applicants, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, and each Applicant listed in Tabulation B making such sale is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(3) Applicants are able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act, and

the requirements, rules and regulations of the Commission thereunder.

(4) The sales by Applicants, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are required by the public convenience and necessity, and certificates therefor should be issued as hereinafter ordered and conditioned.

(5) All Applicants having requested the omission of the intermediate decision procedure, and all the requirements of the provisions of Section 1.32(b) [18 CFR 1.32(b)] of the Commission's Rules of Practice and Procedure having been satisfied, sufficient cause exists for the Commission forthwith to render its final decision in the instant proceeding.

The Commission orders:

(A) Certificates of public convenience and necessity be and are hereby issued authorizing the sales of natural gas by each of the Applicants designated in Tabulation A above to United Fuel Gas Company as hereinbefore described, together with whatever facilities subject to the jurisdiction of the Commission may be necessary to consummate such sales or render such services, as more fully described in the applications in the respective Dockets, said sales being sales in interstate commerce of natural gas for resale for ultimate public consumption, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(B) Certificates of public convenience and necessity be and are hereby issued authorizing the sales of natural gas by each of the Applicants as hereinbefore described in Tabulation B up to November 1, 1954, or until United Fuel is prepared to take the gas, whichever occurs first, together with whatever facilities subject to the jurisdiction of the Commission may be necessary to consummate such sale or render such service as more fully

described in the applications in the respective Dockets indicated in Tabulation B, said sales being sales in interstate commerce of natural gas for resale for ultimate public consumption subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(C) The certificates herein granted shall be void and without force or effect unless accepted in writing by each Applicant within 30 days from date of issuance of this order.

(D) The certificates herein granted are not transferable and shall be effective only so long as Applicants continue the acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Applicants.

(F) The certificates herein granted are issued to Applicants individually and the rights and obligations thereunder shall be several and not joint.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

Adopted: October 28, 1954.

Issued: October 28, 1954.

In the Matters of:

Cities Production Corporation, et al.

Docket No. G-2721, et al.

Digby, Commissioner, concurring:

I concur in the order granting a certificate of public convenience and necessity to sell natural gas. I object to any reference in the order concerning the issuance of a certificate of public convenience and necessity for the facilities of the independent producer or gatherer of gas.

A certificate of public convenience and necessity is neither required nor properly issued for construction and operation of facilities of a producer or gatherer. The action of a majority of this Commission issuing a certificate for .....0 facilities is improper for it represents an assertion of power denied to us by Congress.

We have recognized the absence of power over facilities when, in Order No. 174 and Order No. 174-A, we failed to provide any procedure whereby application could be made for a certificate authorizing their construction and operation. We did promulgate procedural rules to enable filing of applications for certificates authorizing a sale or transportation. There was not even a suggestion that at some later time we would authorize or require authorization for construction and operation of facilities.

The action heretofore taken, insofar as it made no provision with respect to facilities, was wholly consistent with the declarations of the Supreme Court in Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U. S. 498, 505; Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 598; Interstate Natural Gas Company v. Federal Power Commission, 331 U. S. 682, 690-691, and Phillips Petroleum Company v. State of Wisconsin, 74 Sup. Ct. 794, 797-798. The language of the Court in these cases is clear and unambiguous. In Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, the Court stated

that the "natural and clear meaning" of production or gathering contained in Section 1(b) of the Act encompassed "the producing properties and gathering facilities of a natural-gas company." In Colorado Interstate Gas Co. v. Federal Power Commission, supra, the Court stated that the production or gathering exemption applies to the "physical activities, facilities and properties used in the production and gathering of natural gas." In Interstate Natural Gas Company v. Federal Power Commission, supra, the Court stated that effect must be given to the exemption of producing and gathering, and indicated clearly that facilities, properties and activities of a producer and gatherer were exempted. The Court, in Phillips Petroleum Company v. State of Wisconsin, supra, held only that a sale in interstate commerce for resale was not within the exemption of Section 1(b). The discussion with respect to facilities and the recitation of the above-cited cases represents clear recognition of the intended scope and effect of the exemption as regards facilities.

The issue to be resolved is whether the Natural Gas Act requires that a certificate of public convenience and necessity issue for construction and operation of the facilities necessary to effect a sale by a producer or gatherer in interstate commerce for resale. The issue is not whether a sale of gas in interstate commerce for resale can be made without facilities. It cannot be doubted that facilities necessary to effect a sale of natural gas in interstate commerce are facilities used in interstate commerce. Recognition of this fact cannot, however, create power in this Commission to issue, much less to require, certificates authorizing construction and operation of such facilities.

S. L. Digby,
Commissioner.

Date filed: October 28, 1954.

Date of Issuance: October 28, 1954.

## APPENDIX H

**Findings and Order Issuing Certificates of Public Convenience and Necessity.**

Docketed Oct. 28, 1954.

UNITED STATES OF AMERICA.
FEDERAL POWER COMMISSION.

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matters of:

CITIES PRODUCTION CORPORATION—Docket No. G-2721,
TEXAS GULF PRODUCING COMPANY and THE AMERICAN OIL COMPANY—Docket No. G-2793,
FOREST OIL CORPORATION—Docket No. G-2798,
TIDE WATER ASSOCIATED OIL COMPANY—Docket No. G-2801,
TIDE WATER ASSOCIATED OIL COMPANY—Docket No. G-2802,
TIDE WATER ASSOCIATED OIL COMPANY, ET AL.—Docket No. G-2803,
FOREST OIL CORPORATION, ET AL.—Docket No. G-2804,
NATURAL GAS DISTRIBUTING CORPORATION—Docket No. G-2945,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3106,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3108,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3109,
HUMBLE OIL AND REFINING COMPANY—Docket No. G-3110,
THE MID-GULF EXPLORATION COMPANY—Docket No. G-3148,
PAN AMERICAN PRODUCTION COMPANY—Docket No. G-3209,
PAN AMERICAN PRODUCTION COMPANY—Docket No. G-3216,
E. G. BATEMAN, d.b.a. BATEMAN DRILLING COMPANY—Docket No. G-3298,
THE TEXAS COMPANY—Docket No. G-3643,
THE TEXAS COMPANY, ET AL.—Docket No. G-3644,

THE TEXAS COMPANY—Docket No. G-3645,
THE TEXAS COMPANY, ET AL.—Docket No. G-3646,
THE TEXAS COMPANY—Docket No. G-3647,
—100-2 Formal,
THE ATLANTIC REFINING COMPANY—Docket No. G-3765.

The Applicants designated in Tabulation A below have filed, as independent producers of natural gas, their applications for certificates of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, authorizing the sale of natural gas produced from the indicated fields to United Fuel Gas Company (United Fuel). All sales are to be made in accordance with the respective contractual obligations. Deliveries of the gas are to be made to Gulf Interstate Gas Company's (Gulf Interstate) existing line (Docket No. G-2058) for transportation by Gulf Interstate for the account of United Fuel. The proposed sales are to be made at the respective points of interconnection of Applicants' facilities with those of Gulf Interstate.

TABULATION "A"

| Docket No. | Applicant—Address | Date Filed | Location of Field |
|---|---|---|---|
| G-2721 | Cities Production Corp., a Delaware corporation, Bartlesville, Okla. | 9-10-54 | Bourg field, Terrebonne and Lafourche Parishes, La. |
| G-2793 | Texas Gulf Producing Co., a Delaware corporation, Houston, Texas, and American Oil Co., a Maryland corporation, New York, N. Y. (as supplemented 10-25-54) | 9-16-54 | Lake Long field, Lafourche Parish, La. |
| G-2798 | Forest Oil Corporation, a New York corporation, Bradford, Pa. | 9-17-54 | Bourg and North Bourg fields, Lafourche Parish, La. |
| G-2801 | Tide Water Associated Oil Co., a Delaware corporation, San Francisco, Calif. | 9-17-54 | Erath field, Vermilion Parish, La. |
| G-2802 | Tide Water Associated Oil Co., a Delaware corporation, San Francisco, Calif. | 9-17-54 | North Bourg field, Lafourche Parish, La. |
| G-2803 | Tide Water Associated Oil Co., a Delaware corporation, and others as listed in the application, San Francisco, Calif. | 9-17-54 | Florence field, Vermilion Parish, La. |

| Docket No. | Applicant—Address | Date Filed | Location of Field |
|---|---|---|---|
| G-2804 | Forest Oil Corporation, a New York corporation, Bradford, Pa., Acadia Investments, Inc., a Delaware corporation, and certain individuals as listed in application, Dover, Del. | 9-17-54 | Ellis field, Acadia Parish, La. |
| G-2945 | Natural Gas Distributing Corp., a Texas corporation, Tyler, Texas | 9-22-54 | Killens Ferry and Lamar fields, Tensas and Franklin Parishes, La. |
| G-3106 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Avery Island field, Iberia Parish, La. |
| G-3108 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Cameron Meadows field, Cameron Parish, La. |
| G-3109 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Erath field, Vermilion Parish, La. |
| G-3110 | Humble Oil and Refining Co., a Texas corporation, Houston, Texas | 9-24-54 | Ellis field, Acadia Parish, La. |
| G-3148 | Mid-Gulf Exploration Co., a Maryland corporation, Houston, Texas | 9-27-54 | Valentine field, Lafourche Parish, La. |

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| G-3209 | Pan American Production Co., a Delaware corporation, Houston, Texas | 9-27-54 | Church Point and Northwest Branch Areas, Acadia Parish, La. |
| G-3216 | Pan American Production Co., a Delaware corporation, Houston, Texas | 9-27-54 | South Pecan Lake and Little Pecan Lake fields, Cameron Parish, La., and Lake Sand field, St. Mary and Iberia Parishes, La. |
| G-3298 | E. G. Bateman, d.b.a. Bateman Drilling Co., an individual, filing for himself and others, New Orleans, La. | 9-27-54 | Ellis field, Acadia Parish, La. |
| G-3643 | The Texas Company, a Delaware corporation, Houston, Texas | 9-29-54 | East Mud Lake field, Cameron Parish, La. |
| G-3644 | The Texas Company, a Delaware corporation, for itself and others, as listed in the application, Houston, Texas | 9-29-54 | Valentine field, Lafourche Parish, La. |
| G-3645 | The Texas Company, a Delaware corporation, Houston, Texas | 9-29-54 | Bayou Sale and Horseshoe Bayou fields, St. Mary Parish, La. |

| Docket No. | Applicant—Address | Date Filed | Location of Field |
|---|---|---|---|
| G-3646 | The Texas Company, a Delaware corporation, for itself and others, as listed in the application, Houston, Texas | 9-29-54 | Erath field, Vermilion Parish, La. |
| G-3647 | The Texas Company, a Delaware corporation, Houston, Texas | 9-29-54 | Various field in Terrebonne, Lafourche, St. Charles, and Jefferson Parishes, La. |
| G-3765 | The Atlantic Refining Co., a Pennsylvania corporation, Dallas, Texas | 9-30-54 | Midland - Estherwood field, Acadia Parish, La. |

The applicants designated in Tabulation B below are presently selling gas from the above respectively indicated fields under interim contracts with the hereinafter indicated purchasers. These applicants seek, in addition to the hereinbefore stated authorization, limited certificates of public convenience and necessity authorizing the designated interim sales until November 1, 1954, or until United Fuel is prepared to take the gas.

VERTICAL IN BOOK

TABULATION "B"

| Docket No. | Applicant | Interim Purchaser |
|---|---|---|
| G-2721 | Cities Production Corp. | United Gas Pipe Line Company |
| G-2798 | Forest Oil Corp. | United Gas Pipe Line Company |
| G-2804 | Forest Oil Corp., et al. | Transcontinental Gas Pipe Line Corp. |
| G-3106 | Humble Oil and Refining Co. | United Gas Pipe Line Company |
| G-3108 | Humble Oil and Refining Co. | Magnolia Petroleum Company |
| G-3209 | Pan American Production Co. | Texas Northern Gas Corp. and United Gas Pipe Line Co., under Operators' agreement |
| G-3298 | E. G. Bateman | Transcontinental Gas Pipe Line Corp. |
| G-3765 | Atlantic Refining Co. | Tennessee Gas Transmission Co. |

Pursuant to due notice, a public hearing was held in Washington, D.C., on October 26 and 28, 1954, respecting the matters involved in and the issues presented by the applications. The single petition to intervene filed in Docket No. G-2793 having been withdrawn prior to Commission action thereon, no protest to any of the applications is on file.

The Commission finds:

(1) The proposed sales of natural gas hereinbefore described in Tabulation "A", as more fully described in the applications, will be sales of natural gas in interstate commerce, subject to the jurisdiction of the Commission, and such sales by Applicants, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, and each Applicant, upon the commencement of the operations hereinbefore described, as more fully described in the applications listed in Tabulation A, will, therefore, be a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas hereinbefore described in Tabulation B, as more fully described in the applications, are sales of natural gas in interstate commerce, subject to the jurisdiction of the Commission, and such sales by Applicants, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act, and each Applicant listed in Tabulation B making such sale is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(3) Applicants are able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act, and

the requirements, rules and regulations of the Commission thereunder.

(4) The sales by Applicants, together with whatever facilities subject to the jurisdiction of the Commission are necessary therefor, are required by the public convenience and necessity, and certificates therefor should be issued as hereinafter ordered and conditioned.

(5) All Applicants having requested the omission of the intermediate decision procedure, and all the requirements of the provisions of Section 1.32(b) [18 CFR 1.32(b)] of the Commission's Rules of Practice and Procedure having been satisfied, sufficient cause exists for the Commission forthwith to render its final decision in the instant proceeding.

The Commission orders:

(A) Certificates of public convenience and necessity be and are hereby issued authorizing the sales of natural gas by each of the Applicants designated in Tabulation A above to United Fuel Gas Company as hereinbefore described, together with whatever facilities subject to the jurisdiction of the Commission may be necessary to consummate such sales or render such services, as more fully described in the applications in the respective Dockets, said sales being sales in interstate commerce of natural gas for resale for ultimate public consumption, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(B) Certificates of public convenience and necessity be and are hereby issued authorizing the sales of natural gas by each of the Applicants as hereinbefore described in Tabulation B up to November 1, 1954, or until United Fuel is prepared to take the gas, whichever occurs first, together with whatever facilities subject to the jurisdiction of the Commission may be necessary to consummate such sale or render such service as more fully

described in the applications in the respective Dockets indicated in Tabulation B, said sales being sales in interstate commerce of natural gas for resale for ultimate public consumption subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(C) The certificates herein granted shall be void and without force or effect unless accepted in writing by each Applicant within 30 days from date of issuance of this order.

(D) The certificates herein granted are not transferable and shall be effective only so long as Applicants continue the acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Applicants.

(F) The certificates herein granted are issued to Applicants individually and the rights and obligations thereunder shall be several and not joint.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

Adopted: October 28, 1954.

Issued: October 28, 1954.

In the Matters of:

Cities Production Corporation, et al.
Docket No. G-2721, et al.

Digby, Commissioner, concurring:

I concur in the order granting a certificate of public convenience and necessity to sell natural gas. I object to any reference in the order concerning the issuance of a certificate of public convenience and necessity for the facilities of the independent producer or gatherer of gas.

A certificate of public convenience and necessity is neither required nor properly issued for construction and operation of facilities of a producer or gatherer. The action of a majority of this Commission issuing a certificate for ..... facilities is improper for it represents an assertion of power denied to us by Congress.

We have recognized the absence of power over facilities when, in Order No. 174 and Order No. 174-A, we failed to provide any procedure whereby application could be made for a certificate authorizing their construction and operation. We did promulgate procedural rules to enable filing of applications for certificates authorizing a sale or transportation. There was not even a suggestion that at some later time we would authorize or require authorization for construction and operation of facilities.

The action heretofore taken, insofar as it made no provision with respect to facilities, was wholly consistent with the declarations of the Supreme Court in Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U. S. 498, 505; Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 598; Interstate Natural Gas Company v. Federal Power Commission, 331 U. S. 682, 690-691, and Phillips Petroleum Company v. State of Wisconsin, 74 Sup. Ct. 794, 797-798. The language of the Court in these cases is clear and unambiguous. In Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, the Court stated

that the "natural and clear meaning" of production or gathering contained in Section 1(b) of the Act encompassed "the producing properties and gathering facilities of a natural-gas company." In Colorado Interstate Gas Co. v. Federal Power Commission, supra, the Court stated that the production or gathering exemption applies to the "physical activities, facilities and properties used in the production and gathering of natural gas." In Interstate Natural Gas Company v. Federal Power Commission, supra, the Court stated that effect must be given to the exemption of producing and gathering, and indicated clearly that facilities, properties and activities of a producer and gatherer were exempted. The Court, in Phillips Petroleum Company v. State of Wisconsin, supra, held only that a sale in interstate commerce for resale was not within the exemption of Section 1(b). The discussion with respect to facilities and the recitation of the above-cited cases represents clear recognition of the intended scope and effect of the exemption as regards facilities.

The issue to be resolved is whether the Natural Gas Act requires that a certificate of public convenience and necessity issue for construction and operation of the facilities necessary to effect a sale by a producer or gatherer in interstate commerce for resale. The issue is not whether a sale of gas in interstate commerce for resale can be made without facilities. It cannot be doubted that facilities necessary to effect a sale of natural gas in interstate commerce are facilities used in interstate commerce. Recognition of this fact cannot, however, create power in this Commission to issue, much less to require, certificates authorizing construction and operation of such facilities.

S. L. Digby,
Commissioner.

Date filed: October 28, 1954.

Date of Issuance: October 28, 1954.

## APPENDIX I

**Findings and Order Issuing Certificate of Public Convenience and Necessity.**

Docketed Jan. 26, 1955.

UNITED STATES OF AMERICA.
FEDERAL POWER COMMISSION.

Before Commissioners: Jerome K. Kuykendall, Chairman; Nelson Lee Smith and Frederick Stueck.

In the Matter of:

THE TEXAS COMPANY, ET AL.
Docket No. G-3648—100-2 Formal.

The Texas Company, for itself and on behalf of Cities Service Oil Company, Tide Water Associated Oil Company, and J. Brown Cutbirth, hereinafter called Applicant, an independent producer with its principal place of business in Houston, Texas, filed on September 29, 1954, as supplemented on November 8, 1954, an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, authorizing the Applicant to sell natural gas as hereinafter described, subject to the jurisdiction of the Commission, all as more fully represented in the application.

Applicant sells natural gas produced in the Chocolate Bayou Field, Brazoria County, Texas, to Texas Illinois Natural Gas Pipeline Company (Texas Illinois) in interstate commerce for resale. Deliveries are made in accordance with the obligations under contract dated December 1, 1952, at the interconnection of Applicant's facilities with those of Texas Illinois.

Pursuant to due notice, a public hearing was held in Washington, D. C., on January 20, 1955, respecting the

matters involved in and the issues presented by the application. No petition to intervene or protest to the granting of the application has been received. Staff counsel moved orally at the hearing that the intermediate decision procedure be omitted and the Commission render a decision herein pursuant to Section 1.30 [(c) (1)] of the Commission's Rules of Practice and Procedure.

The Commission finds:

(1) Applicant, an independent producer of natural gas is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sale of natural gas hereinbefore described, as more fully described in the application, is made in interstate commerce, subject to the jurisdiction of the Commission, and such sale by Applicant, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(4) The sale of natural gas by Applicant, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned.

(5) A request during the public hearing by Staff Counsel for omission of the intermediate decision pro-

cedure under Section 1.30 (c) of the Commission's Rules of Practice and Procedure, was unopposed by any party of record and, not having been denied by the Commission, is granted pursuant to Section 1.30 (c) (1) of said Rules.

The Commission orders:

(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the continued operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

(B) The certificate shall be accepted in writing and under oath by Applicant within 30 days from the issuance of this order.

(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the service herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Applicant. Further, our action in this proceeding shall not foreclose nor prejudice any future proceeding or objection relating to the operation of any

price or related provision in the gas purchase contracts herein involved.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

Adopted: January 26, 1955.

Issued: January 28, 1955.

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## CITATIONS


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# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 583

THE TEXAS COMPANY, PETITIONER

*v.*

FEDERAL POWER COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

### OPINION BELOW

Order No. 174–A of the Federal Power Commission (Pet. App. 70a–88a) is reported at 19 Fed. Reg. 5081. The opinion of the Court of Appeals (Pet. App. 1a–5a) is reported at 236 F. 2d 813.[1]

### JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (Pet. App. 58a). A petition for rehearing, timely filed, was denied on August 21, 1956

[1] The opinion of the court below in *Magnolia Petroleum Co., et al* v. *Federal Power Commission* (Pet. App. 6a–57a), relied on by the court in this case, is reported at 236 F. 2d 785. Judge Brown's dissenting opinion in both this case and *Magnolia* is reported at 236 F. 2d 793.

(Pet. App. 58a). The petition for a writ of certiorari was filed on November 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

### QUESTION PRESENTED

Whether a Court of Appeals has jurisdiction, under Section 19 (b) of the Natural Gas Act, to review a general order of the Federal Power Commission providing a simplified procedure whereby those independent producers subject to regulation under the Act by virtue of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, may come into compliance with the Act.

### STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission Regulations are set forth in the Appendix to the petition at pages 60a–115a.

### STATEMENT

By a petition filed in the United States Court of Appeals for the Fifth Circuit, petitioner, an independent producer of natural gas, sought review of an order of the Federal Power Commission (Order No. 174–A) establishing a procedure for effectuating this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. The Court of Appeals dismissed the petition, holding that the Commission order was not reviewable under Section 19 (b) of the

Natural Gas Act. The relevant facts may be summarized as follows:

On June 7, 1954, this Court held in the *Phillips* case that independent producers of natural gas were subject to regulation under the Natural Gas Act to the extent that they engaged in "wholesales of natural gas in interstate commerce" (347 U. S. at 682). Prior to that time, the Federal Power Commission had directed its regulation under the Act to companies engaged primarily in interstate pipeline operations, and activities incident thereto; the rules and orders issued by the Commission had been mainly designed to implement regulation of such interstate pipeline companies (F. P. C. Order No. 144, 13 F. R. 6371). However, these rules and orders were directed to "natural-gas companies," and so in terms included the independent producers which were held by the *Phillips* decision to be "natural-gas companies." Not wishing to subject these independent producers to the more onerous requirements of the rules and regulations applicable to pipeline companies, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by the Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A, which super-

seded Order No. 174 but made no substantial change in the provisions here involved (19 F. R. 5081).[2]

Order No. 174–A adopted substantially the language of the *Phillips* decision in defining a class of independent producers of natural gas subject to the Act as including those natural gas companies "engaged in the production or gathering of natural gas and who transport[s] natural gas in interstate commerce or sell[s] natural gas in interstate commerce for resale * * *" (347 U. S. 683, 684; Pet. App. 71a). The order did not purport to determine which of the over 4,000 independent producers were subject to regulation under the Act but left such determinations, which frequently involve complex factual questions, to individual hearings.[3] The order

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[2] The orders were issued without notice or hearing because the Commission found, in accordance with Section 4 (a) of the Administrative Procedure Act, 5 U. S. C. 1003 (a), that "good cause exists for making the rules and regulations herein adopted effective on less than thirty days' notice" in order to minimize the uncertainty and confusion which would result from delay in carrying out this Court's mandate in the *Phillips* proceeding (19 Fed. Reg. 4534).

[3] In issuing Order No. 174, the Commission had stated (19 Fed. Reg. 4534, 4535):

"Although the decision of the Supreme Court is, of itself, notice to all 'independent producers,' as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.

"Of course, any action which requires Commission approval under the law is not effective without it. The Commission will

required producers subject to the Act to file with the Commission, by October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service (Pt. App. 72a, 77a). When a large number of natural gas producers, including petitioner, filed motions for rehearing and a stay of Order No. 174–A, the Commission denied all the requests for stays but called for briefs and suggestions as to revision of the order and granted oral argument on the motions (Pet. App. 90a). Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (Pet. App. 90a). On December 17, 1954, the Commission amended and reissued Order No. 174–A as Order No. 174–B (19 F. R. 8807), and denied all applications for rehearing.[4]

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do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth."

[4] Only 174–A is involved in this proceeding, although Order No. 174–B in material respects is identical to the prior order (Pet. App. 89a–115a). In Order No. 174–B, the Commission emphasized that the order was procedural and non-substantive in nature and went on to state (Pet. App. 91a):

"* * * We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions."

Prior to the issuance of Order No. 174–B on December 17, 1954, petitioner, under protest, had filed, between September 29 and December 1, 1954, numerous rate schedules with the Commission pursuant to Order No. 174–A, including thirteen contracts involving sales of gas at the tail-gate of its processing plants (Pet. App. 2a). Simultaneously, petitioner had applied for certificates of public convenience and necessity, also under protest, on the service provided under those contracts. On October 28, 1954, and January 26, 1955, the Commission issued certificates of public convenience and necessity covering sales under three of the contracts, thereby determining that the sales in question were subject to the Natural Gas Act and the Commission's jurisdiction (Pet. App. 116a–145a).

When petitioner filed in the court below its petition for review of Order No. 174–A on February 10, 1955 (Pet. 4), it sought to include in the record before the court the records of the independent proceedings involving the three gas sales contracts (Pet. App. 3a). The court granted the motion for certification of the additional record and postponed hearing of the Commission's objections until argument on the merits (Pet. App. 3a). Following the hearing, the court held that it had no jurisdiction to review Orders Nos. 174, 174–A, and 174–B, which it found were procedural and interlocutory and did not purport to determine petitioner's status under the Natural Gas Act; the court stated that "Those orders promulgating rules and regulations of general applicability, which are nonreviewable under Section 19 (b) because they of

themselves neither determine status nor compel compliance with other mandatory orders of the Commission, are not transformed into reviewable orders simply because by separate orders the Commission has adjudicated petitioner's status" (Pet. App. 4a–5a). The court also struck the additional record sought by petitioner, as having no bearing on the reviewability of a procedural order which itself did not purport to determine petitioner's status under the Act (Pet. App. 4a–5a).

**ARGUMENT**

1. Petitioners' argument (Pet. 6–10) that procedural Orders Nos. 174, 174–A and 174–B are reviewable in a proceeding under Section 19 (b) of the Natural Gas Act is substantially the same as that advanced in the petition for certiorari in *Magnolia Petroleum Company* v. *Federal Power Commission,* No. 558, this Term, and the court below relies on its opinion in *Magnolia* in disposing of this aspect of the case. The discussion in the Commission's brief in opposition in *Magnolia* is fully applicable to this contention and we respectfully refer the Court to that brief.[5]

2. Petitioner argues (Pet. 12–14) that the fact that over its protests it has been held subject to the Act, and to the Commission's jurisdiction as to certain of

[5] Petitioners' reliance (Pet. 8) on *Rochester Telephone Corp.* v. *United States* 307 U. S. 125, ignores the fact that the Communications Commission, in the order there involved, had made a final and conclusive determination of the status of the particular company.

its sales,[6] gives it a special standing to challenge the validity of a general procedural order in a separate proceeding. But, as shown by the very supplemental record on which petitioner founded its contention (Original Supplemental Transcript of Record in C. A. 5, No. 15,470, pp. 1, 84, 149), in its application for certificates for those sales filed prior to the December 1, 1954 deadline provided in Order No. 174–A as amended, each stated:

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> This application is made under protest and to avoid the penalties provided in Sec. 21 of the Natural Gas Act. It is also made subject to applicant's Application for Rehearing in respect to Order 174–A, filed August 25, 1954, Federal Power Commission Docket R–138, any and all resulting decisions, determinations, proceedings, orders, rules, or regulations, and any judicial appeals therefrom or reviews thereof. By filing this application, applicant does not admit that it or the sales of gas embraced by the above mentioned contracts are subject to regulation by the Commission and applicant hereby expressly reserves not only its legal and equitable rights to contest such regulation but also any and all contractual rights it now has or may in the future have by virtue of the terms and provisions of said contracts, whether or not same conflict with or may be contrary to the provisions of any order, rule, regulation, decision or determination that has or may be issued or adopted by the Commission.

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[6] The sales are those covered by the certificates issued in FPC Dockets Nos. G–3643 to G–3648 inclusive (Pet. App. 116a–145a).

> Applicant's description or showing of any facilities in this application or in any Exhibit attached hereto is intended only for the information of the Commission, and not for the purpose of requesting a certificate of public convenience and necessity for the construction or operation of such facilities. All such facilities constitute, in the opinion of the Applicant, facilities for the production and/or gathering of natural gas within the meaning of Section 1 (b) of the Natural Gas Act whether or not Applicant is a natural gas company and, therefore, no certificate of public convenience and necessity is required or is sought for such facilities. Application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described.[7]

Despite the fact that petitioner thus objected to the Commission's assumption of jurisdiction over its gas sales, as well as jurisdiction over its facilities, it did not petition for review of the Commission's orders of October 28, 1954, and January 26, 1955. Rather, it adopted the expedient of bringing this entirely separate proceeding attacking procedural Orders Nos. 174, 174–A, and 174–B, and then attempted to obtain

[7] Application filed September 29, 1954 in Docket Nos. G–3643 to G–3648 inclusive, files of the Commission. Petitioner "accepted" the certificates of convenience and necessity "subject to the protest and other matters set forth in paragraphs (6) and (7)" of its applications. Letter from The Texas Company dated November 15, 1954 in each of Docket Nos. G–3643 to G–3647 inclusive, and letter dated February 11, 1955 in Docket No. G–3648, files of the Commission. Three of those letters are printed in the Original Supplemental Transcript of Record in C. A. 5, No. 15,470, pp. 83, 148, 264.

review, *inter alia,* of the issues raised (or which should have been raised) in the prior certificate proceedings by incorporating the record of those proceedings here.

Petitioner's allegations of invalidity fall into two categories: (1) those dealing with the prospective application of the Natural Gas Act to its contract sales or rate increases (Pet. 15–21, 25–26) and (2) objections to applying the Act, in any way, to its "facilities" (Pet. 21–25).[8] All of these objections were specifically reserved by petitioner in the certificate proceedings involving petitioner's sales (*supra,* pp. 8–9), and the questions relating to "facilities," as the dissenting commissioner recognized, were expressly put in issue by the Commission's order in that proceeding (Pet. App. 127a–128a, 140a–141a). Petitioner could have obtained judicial review of the orders issued in its certificate proceedings which directly involved the "facilities" questions, argued at pp. 21–25 of its petition, but it chose not to do so. Similarly, petitioner can obtain review of the Commission's allegedly invalid interpretation of the Act as applied to its contract sales or rate increases (see Pet. 15–21, 25–26) at the conclusion of proceedings now in prog-

[8] Petitioner makes one further assertion (Pet. 27–28) that Orders 174, 174–A, and 174–B were issued without notice or hearing and hence were invalid. We believe this contention is without merit; among other reasons, an appropriate hearing was provided before Order No. 174–B was issued. See Pet. App. 2a; Section 4 (a), Administrative Procedure Act, 5 U. S. C. 1003 (a); *Amerada Petroleum Corp.* v. *Federal Power Commission* 231 F. 2d 461 (C. A. 10). Cf. *American Trucking Association* v. *United States* 344 U. S. 298, 318–320.

ress to determine the validity of rate increases filed by it pursuant to the contracts involved in its certificate proceeding.[9]

Since petitioner has failed to pursue the obvious administrative remedies available to it, it is certainly foreclosed from obtaining review of its allegations of illegality in this proceeding. See *Federal Power Commission* v. *Union Producing Co.,* 230 F. 2d 36, 40 (C. A. D. C.), certiorari denied, 351 U. S. 927.

Moreover, while petitioner (Pet. 8, 11–12, 14) is *now* willing to concede, for the purpose of obtaining review of the procedural orders in this proceeding, that it is subject to the Commission's jurisdiction as to some of its sales, it seems clear that its basic position, like that of the petitioners in *Magnolia,* is that it is not a natural gas company subject to the Act; and it has not abandoned this position in any proceeding before the Commission involving its substantive rights. There is no fundamental difference, therefore, between this case and *Magnolia,* and petitioner's attempt to combine issues and records in two

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[9] A number of these proceedings are now in process. For example, on September 29, 1954, petitioner under protest applied for, and obtained, a certificate for gas sales made pursuant to a contract with United Fuel Gas Co. executed May 22, 1953 (Docket No. G–3647; Pet. App. 121a), and on the same date filed this contract as its FPC Gas Rate Schedule No. 2. On September 21, 1956, it filed an increase in rates pursuant to an escalation provision in this contract which was suspended by the Commission for a period of five months, pursuant to Section 4 (e) of the Act. A hearing is now in progress to determine the validity of the rate increase (Docket No. G–11321). The questions raised here by petitioner at pp. 15–21, 25–26 of its petition may be raised in that proceeding and will be reviewable when the Commission makes a final order in regard to the rate increase.

independent proceedings serves only to emphasize the fallacy of its argument that it can obtain judicial determination of a wide variety of substantive issues in a proceeding in which these have not been passed upon by the Commission and no record with respect to many of them has been made (especially after it has failed to seek review in proceedings in which a record was made).

## CONCLUSION

For the foregoing reasons, as well as those set out in the Commission's brief in opposition in *Magnolia Petroleum Co.* v. *Federal Power Commission,* No. 558, this Term, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
*Assistant Attorney General.*
MELVIN RICHTER,
WILLIAM W. ROSS,
*Attorneys.*

WILLARD W. GATCHELL,
*General Counsel,*
HOWARD E. WAHRENBROCK,
*Assistant General Counsel,*
*Federal Power Commission.*

DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956